

87-576

No. 87-

Supreme Court, U.S.
FILED

OCT 8 1987

JOSEPH E. SPANIO, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

HAROLD Y. SHINTAKU, AND ARNOLD B. GOLDEN,
Petitioners,

v.

DONALD D. COWAN,
Respondent.

**Petition For A Writ Of Certiorari To The
Supreme Court Of Hawaii**

APPENDIX TO THE PETITION FOR CERTIORARI

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PETITIONERS' APPENDIX

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APPENDIX A

NO. 10256

IN THE SUPREME COURT
OF THE STATE OF HAWAII

DONALD D. COWAN,

CIVIL NO. 71638

Respondent-Appellant,

APPLICATION FOR WRIT OF
CERTIORARI

vs.

INTERMEDIATE COURT OF
APPEALS

STATE OF HAWAII, HAROLD Y.

SHINTAKU, ARNOLD B. GOLDEN

and LAWRENCE A. GOYA,

HONORABLE JAMES S. BURNS,

WALTER M. HEEN AND

Petitioners-Appellees,

HARRY T. TANAKA, JUDGES

and

CITY AND COUNTY OF

HONOLULU and SANDRA

ALEXANDRA,

Respondents-Appellees,

and

KENT T. KUNIYUKI,

Defendant.

FILED

1987 JUN 23 PM 3:23

Eugene L. Sabado

CLERK SUPREME COURT

ORDER

In view of the opinion of the United States Supreme Court in *St. Francis College v. Al-Khazraji*, ___ U.S. ___, 107 S.Ct. 2022, ___ L.Ed.2d ___, 55 U.S.L.W. 4626 (1987),

IT IS HEREBY ORDERED that the Memorandum Opinion of the Intermediate Court of Appeals is affirmed.

DATED: Honolulu, Hawaii, June 23, 1987.

/s/H. Lum

/s/Edward H. Nakamura

/s/Frank Padgett

/s/Yoshimi Hayashi

/s/Robert Won Bae Chang

Steven S. Michaels and
Russell A. Suzuki,
Deputy Attorneys General
on the Writ for petitioners

Donald D. Cowan,
pro se, on the supplemental
brief

APPENDIX B

NO 10256

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

DONALD D. COWAN,

Plaintiff-Appellant,

v.

STATE OF HAWAII, CITY AND
COUNTY OF HONOLULU,
HAROLD Y. SHINTAKU, SANDRA
ALEXANDER, ARNOLD B.
GOLDEN and LAWRENCE A.
GOYA,

Defendants-Appellees,

and

KEN T. KUNTYUKI,

Defendant.

CIVIL NO. 71638

APPEAL FROM THE CON-
CLUSIONS OF LAW AND
ORDER GRANTING MOTION
TO DISMISS COMPLAINT OR
ALTERNATIVELY FOR
SUMMARY JUDGMENT AS
AGAINST DEFENDANTS
STATE OF HAWAII, HAR-
OLD Y. SHINTAKU, ARNOLD
B. GOLDEN AND LAW-
RENCE A. GOYA, FILED
JUNE 14, 1983; AND ORDER
GRANTING MOTION TO DIS-
MISS COMPLAINT AGAINST
SANDRA ALEXANDER AND
CITY AND COUNTY OF HON-
OLULU, FILED JULY 21,
1983

FIRST CIRCUIT COURT

HONORABLE JAMES H.
WAKATSUKI
HONORABLE PHILIP T.
CHUN
JUDGES

FILED
1986 SEP 22 9:56
DARREL M. PHILLIPS
CLERK
INTERMEDIATE
COURT OF APPEALS

MEMORANDUM OPINION

Plaintiff Donald D. Cowan (Cowan) appeals the lower court's June 14, 1983 order dismissing his 18-count complaint for damages against defendants State of Hawaii (State), former Circuit Judge Harold Y. Shintaku (Judge Shintaku), Dr. Arnold B. Golden (Dr. Golden), and Deputy Public Defender Lawrence A. Goya (Goya). He also appeals the lower court's July 21, 1983 order dismissing his 18-count complaint for damages against defendants City and County of Honolulu (City) and Deputy Prosecutor Sandra Alexander (Alexander). We affirm the appealed orders except with respect to Counts XV and XVI.

On April 5, 1979 in First Circuit Civil 57584,¹ Jeanette Spoone (Spoone) filed a complaint against Cowan alleging that he had been harassing and tormenting her. She sought injunctive relief and damages. Cowan never was represented by or offered counsel in this case.

Upon the stipulation of the parties, Circuit Judge Fong (Judge Fong) on May 15, 1979 issued an injunction enjoining Cowan "for a period of four (4) years:

- (1) From writing any letters to Plaintiff or any member of her immediate family, and
- (2) From following Plaintiff or any member of her immediate family, and
- (3) From the use of Kawaihae Street, City and County of Honolulu, State of Hawaii, save and except that

¹ Except as specifically noted herein, all court proceedings mentioned occurred in First Circuit Civil 57584.

portion thereof extending from Kalaniana'ole Highway to Keokea Place, and

- (4) From telephoning or otherwise communicating with Plaintiff at her place of residence or her place of employment."

At Spoone's request, Judge Fong on July 23, 1979 issued an order to show cause (OSC) directing Cowan to show why he should not be held in contempt of court for violating the May 15, 1979 injunction.

After a July 27, 1979 hearing at which Cowan represented himself and was not questioned about his lack of counsel, Judge Shintaku on August 8, 1979 found that Cowan had repeatedly violated the injunction and sentenced Cowan:

to a term of imprisonment in the City and County jail for a period of six (6) months together with a fine of FIVE HUNDRED AND NO/100 DOLLARS (\$500.00). Imposition of said sentence, however, is suspended for a period of thirteen (13) months. If Defendant further violates the Permanent Injunction in this matter, he will immediately be subject to the above sentence together with whatever additional penalties are appropriate under the circumstances.

Judge Shintaku also broadened the May 15, 1979 injunction by enjoining Cowan from telephoning Spoone's "past and present attorneys."

At Spoone's request, Judge Shintaku on August 13, 1979 issued a second OSC to Cowan. The minutes of the August 30, 1979 hearing indicate that while Cowan was testifying the following occurred:

4:14 p.m. COURT RECESSED to confirm Mr. Cowan's employment with Goodsill Anderson & Quinn (Mr. Barry Kurren).

4:34 p.m. COURT RECONVENED.

DONALD D. COWAN resumed the witness stand.

Examination continued by the Court.

4:35 p.m. Examination by Mr. Kuniyuki.

Testimony by Mr. Cowan

4:50 p.m. Matter taken under advisement; Court to consult with firm as to whether or not Mr. Cowan is to be employed full time.

Further discussion with defendant.

4:55 p.m. COURT ADJOURNED.

On November 26, 1979 Spoone, through her counsel Ken T. Kuniyuki (Kuniyuki), moved for an order imposing sanctions on Cowan for contempt of court. The motion cited Hawaii Revised Statutes (HRS) § 710-1077 and Rule 35, Hawaii Rules of Civil Procedure (HRC). In an accompanying memo, Kuniyuki advised the court that HRS § 710-1077 allowed it to treat Cowan's violation as a petty misdemeanor and that Rule 35, HRC, allowed it to require Cowan to undergo a psychiatric examination. He asked the court to require Cowan "to serve at least some jail time, perhaps weekends."

On December 10, 1979, at 12:09 p.m., Cowan filed a motion to continue the scheduled December 11, 1979 hearing for 20 days to file motions and to negotiate. The minutes of the December 11, 1979 hearing by Judge Shintaku reveal the following facts: (1) Cowan's motion to continue was denied as follows: "Representation by Mr. Kuniyuki on motion to continue hearing date; representation by Mr. Cowan. Court stated defendant had since April 5, 1979 to obtain an attorney; motion to continue DENIED"; (2) two persons testified—Deputy Prosecutor Alexander and Cowan, a legal secretary at "Ikazaki Devens"; (3) Kuniyuki

examined and Cowan cross-examined Alexander; (4) the court ordered Cowan to be examined by a psychiatrist under Rule 35, HRCF; (5) the court initially declined to send Cowan to jail for six months but decided to impose "weekend jail visit [sic]" by Cowan "so he would be able to see what it was like." However, Cowen then asked that he be sent to jail for the maximum term of six months and be fined \$500. The court granted his request.

On December 11, 1979 Judge Shintaku's clerk filed a mittimus which stated that Cowan had "been duly adjudged guilty . . . of the offense of CIVIL CONTEMPT OF COURT[.]"

A judgment was filed on December 18, 1979. It found Cowan in contempt of court "for having failed and refused to obey" the court's August 8, 1979 order; ordered him imprisoned in the Halawa Correctional Facility for six months commencing December 11, 1979; fined him \$500; and ordered him to undergo psychiatric examination while incarcerated.

The court's minutes state that on December 21, 1979 Judge Shintaku personally interviewed Cowan at the Halawa Correctional Facility in the presence of a court reporter, and Cowan "desired to remain there."

In a 13-page handwritten letter to Judge Shintaku, dated December 24, 1979, Cowan states in relevant part as follows:

I guess sincerity is what I want to show by staying in jail.

I have no other means to show to Jeanie and all concerned that my gut-level intention is *not* that of causing other people, including Jeanie, trouble, or annoyance or threats.

If I accept getting out early from jail, Jeanie and other supporters of punishment of me will simply say:

"He fooled the Court again and got off easy. If only the Court would punish him hard, he'd stop. He's just playing a game. He's basically insincere and devious and needs to be given the maximum punishment."

And on the other hand *a week* in jail is so small a period of torment of me that she and her supporters can laugh at me afterward, tease me, torment me, etc., without a significant twinge of conscience on their part.

This way, by taking the full 6-months sentence, no reasonable person can continue his or her belief that I only want to make trouble for Jeanie and others. This is especially important for Jeanie herself to *know*—to remove any possible doubt from her. When all see me actually make a large, obvious sacrifice of my life's time, they can only infer that my intention is sincere.

(Emphasis in original.)

Dr. Golden's psychiatric report is dated January 8, 1980. In relevant part it states as follows:

At the current time this man is totally refractory to voluntary involvement in psychotherapy. Additionally, incarceration will not substantially change his delusional appreciation of his relationship with Jeannie [sic] and the effects of this relationship upon himself. I would therefore respectfully suggest that a full sanity commission be empaneled for formal assessment of this man's penal responsibility and fitness to stand trial.

In a letter to Cowan's mother in California, dated January 14, 1980, Judge Shintaku states in relevant part as follows:

Enclosed is a copy of the report submitted to me by Dr. Arnold B. Golden, psychiatric consultant for the state. I believe the letter is self-explanatory. As to the recommendation contained at the end of page 3 and continued on page 4, this Court has requested the attorney for Mrs. Spooner to contact the prosecutor's office to see if they could proceed with the criminal action against your son. Since the matter before me was a civil matter, I am not empowered to empanel a sanity commission under our laws. Such a commission would be empanelled in a case of a criminal action.

In an undated, three-page handwritten letter to Judge Shintaku, postmarked January 21, 1980, Cowan states in relevant part as follows:

I would like a *new trial*. I feel that the outcome would have been vastly different had I had a trained lawyer to represent me.

(Emphasis in original.)

The court's minutes state that a hearing was held on January 28, 1980 as follows:

4:05 p.m. Case called; appearances noted of defendant Cowan, Dr. Arnold Golden, Deputy Prosecuting Attorney Sandra Alexander; no appearance by plaintiff's counsel until 4:17 p.m.

Court stated that defendant Cowan had asked for an appeal under Section 802-A on the basis of having failed to have counsel at the time of his hearing; right to counsel applies to criminal trials and did not apply in this case. Record showed that the Court talked to the defendant during his hearing and in Halawa Jail; however, he desired to

remain in jail and was examined by Dr. Golden.

- 4:06 p.m. Representation by Dr. Golden as to his findings on his psychiatric examination of the defendant.
- 4:09 p.m. Representation by Ms. Alexander regarding matters pending in District Court: M-00566 for harassment and M-00567 for assault. Defendant had been served with a copy of the penal summons; arraignment date Friday, February 1.
- 4:11 p.m. Court's colloquy with defendant regarding suspending sentence if defendant made no further calls or disturbances and voluntarily undergoes psychiatric treatment.
- 4:15 p.m. Defendant agreed to voluntary treatment and no further disturbances; also to make District Court appearance and get court appointed attorney.

* * *

- 4:29 p.m. Court ordered defendant released and remainder of jail sentence suspended along with \$500 fine. Defendant to undergo psychiatric treatment and not harass, etc. the plaintiff and others. Defendant to make appearance in District Court and have court appoint attorney. No further action to be taken if defendant continues psychiatric therapy and does not disturb plaintiff.

The court's minutes of February 1, 1980 state as follows:

10:37 a.m. IN CHAMBERS: Present were Defendant Cowan, reporter and clerks.

Request by defendant that Court send him back to jail to finish his sentence; colloquy with the Court.

Court stated it would not send him back to jail but would request that District Court proceed with the criminal matter so that sanity hearing would be held. Suggested that defendant talk to his mother, revered or prison psychiatrist.

The court's minutes of February 5, 1980 state as follows:

10:37 a.m. Informal conference with interested parties; present were: Ken Kuniyuki, Rev. Doug Olson, Deputy Prosecuting Attorney Sandra Alexander, Dr. Arnold Golden, Andrew Hartnett, John Roney and defendant Cowan.

Comments by the Court on developments and reason for conference.

10:40 a.m. Defendant left hearing room.²

10:41 a.m. Comments by Rev. Olson as to defendant's change in attitude.

10:44 a.m. Comments by Dr. Golden as to indications for defendant being institutionalized.

10:45 a.m. Comments by Mr. Hartnett as to circumstances he was personally aware of.

10:46 a.m. Comments by Mr. Roney as to fire and bomb scare.

² In a 55-page affidavit notarized on February 24, 1983 by Valerie Schweigert, Cowan states that he was escorted at Judge Shintaku's direction into Judge Shintaku's chambers.

10:47 a.m. Comments by Mr. Kuniyuki as to Bob Martin receiving calls at his residence after defendant was released, etc.

10:48 a.m. Comments by Ms. Alexander as to district court matter.

10:50 a.m. Further colloquy among the parties.

11:07 a.m. Defendant re-entered hearing room.

Court stated to defendant that he would be sent back to Halawa to serve the remainder of his term in the medical ward.

11:08 a.m. Comments by defendant; colloquy with Court.

11:12 a.m. Defendant to be taken forthwith to jail; procedures to be commenced for involuntary commitment.

11:14 a.m. Conference concluded.

(Footnote added.)

On February 5, 1980 Judge Shintaku's clerk filed another mittimus which again referred to "the offense of CIVIL CONTEMPT OF COURT[.]"

In a one-page handwritten letter to Judge Shintaku, dated February 19, 1980, Cowan states in relevant part as follows:

However, while at the annex I remember coming across a civil contempt law. My distinct impression is that the *civil* contempt law refers *only* to a refusal to *perform* a court-ordered action. And furthermore it refers only to your power to imprison me *until* I *perform* the court-ordered action. I think a mistake was made.

If this is true, then I ask that you declare a mistrial, and release me. For I am convinced that: (A) You in

reality tried me for *criminal* contempt as defined in the HRS statutes; (B) You convicted me "on the basis of *weighing* the evidence," rather than on the required basis of *proof beyond a reasonable doubt*; (C) You imposed the punishment for HRS 710-1077(g) (criminal contempt); (d) You did not assign me a lawyer as required under § [802-1].

(Emphasis in original.)

In a five-page handwritten letter to Judge Shintaku, dated February 24, 1980, Cowan states in relevant part as follows:

You may wonder why I would ask to go back to jail on the one hand, and then ask you to declare a mistrial on the other.

* * *

So if you made a *technical error* in not appointing an attorney for me, please declare a mistrial, and help me avoid a disaster.

I believe, in regard to a possible technical error, that at the contempt hearing I was *charged with* violating 710-1077(g) in addition to Civil Contempt. Thus § 801-2 (802-2??) still should have applied as a basis for the requirement that I be represented by a lawyer at the trial—even though I was ultimately convicted of *Civil Contempt instead of 710-1077(g)*.

(Emphasis in original.)

On March 20, 1980 Goya, a deputy public defender, appeared for Cowan in district court in response to HPD Report M-00567 (assault third of Spoone) and HPD Report M-00566 (harassment of Spoone) and, by agreement, the case was continued.

In a two-page handwritten letter to Judge Shintaku, postmarked March 28, 1980, Cowan states in relevant part as follows:

What this letter is about is [District] Judge Salz's suggestion to transfer me to Kaneohe Hospital. I want to tell you, now, that I am willing to go along with it—that I want it and need it.

In a two-page handwritten letter to District Judge Salz (Judge Salz), dated March 29, 1980, Cowan states in relevant part as follows:

I have changed my mind again, overnight. I want to stay in prison, and not be transferred to Kaneohe. I apologize. The decisions I've been weighing are big ones for me. Primarily my choice is to chicken out or not to chicken out. It is tempting to take the offered easy way out—but I would be ashamed of myself for the rest of my life for giving in.

In a memo dated April 1, 1980 Judge Shintaku responded to Cowan in relevant part as follows:

I understand Mr. Larry Goya of the office of the Public Defender is now representing you. Under those circumstances all communications to the court must come through Mr. Goya. That is the reason why I have not communicated with you up to this point.

On April 7, 1980 Judge Shintaku issued an order. Noting that Judge Salz had ordered Cowan to be examined by a three-judge panel, he ordered Cowan turned over to the State Health Director for the examination and incorporated the results of said exam "with the Judgment" in Civil 57584. The order was prepared by Goya for the Office of the Public Defender as "Attorneys for Defendant."

On April 8, 1980 Goya, for the Office of the Public Defenders as "Attorneys for Defendant" filed the following motion with respect to HPD Reports M-00566 and M-00567:

**MOTION FOR MENTAL EXAMINATION OF
DEFENDANT**

Defendant hereby gives notice of intention to rely on the defense of mental irresponsibility and hereby moves for a mental examination of the defendant was [sic] provided for by Section [704-]404 of the Hawaii Penal Code.

The undersigned believes that the defendant is in need of a mental examination to determine his/her mental condition at the time of the alleged offense(s) and at the present time, and the existence of any mental disease, disorder or defect which would affect defendant's penal responsibility and fitness to proceed.-

DATED: Honolulu, Hawaii, April 8, 1980. In relevant part, Goya's affidavit accompanying his motion stated:

1. That affiant is the court-appointed attorney for the above-named Defendant in the above-captioned matter [sic];

* * *

3. That affiant alleges upon information and belief:

a. That the Defendant's explanation as to his motivation in committing the alleged acts lead the affiant to believe that the Defendant may be mentally disturbed;

b. That Defendant had been examined by Dr. Arnold Golden on a related civil matter and it was Dr. Golden's professional opinion that Defendant was suffering from a mental disease, disorder or defect[.]

District Judge Kanbara granted the motion on April 8, 1980. The three reports were dated as follows: Dr. Goldman's, April 18, 1980; Dr. Knight's, April 21, 1980; and Dr. Ko's, May 1, 1980. Dr. Goldman reported in relevant part as follows:

- 2) The defendant has the capacity to understand the proceeding against him and to assist in his defense.
- 3) At the time of the alleged offense, the defendant lacked the capacity to appreciate the wrongfulness of his conduct and to conform his behavior to the requirements of the law. I believe that the defendant never intended to commit any offense, and that he was obsessed with a need only to justify his previous behavior. It should be noted that the equally obsessive behavior of the complaining Witness was an indispensable ingredient in the escalation of this conflict.

Dr. Knight reported in relevant part as follows:

- 1) The diagnosis now and at the time of the alleged offense is Obsessive Neurosis, with borderline and depressive features.
- 2) The defendant has the capacity to understand the proceedings against him and to assist in his defense.
- 3) At the time of the alleged offense, the defendant lacked the capacity to appreciate the wrongfulness of his conduct and to conform his behavior to the requirements of the law. I believe that the defendant never intended to commit any offense, and that he was obsessed with a need only to justify his previous behavior. It should be noted that the equally obsessive behavior of the complaining Witness was an indispensable ingredient in the escalation of this conflict.

Dr. Ko reported in relevant part as follows:

On the basis of this interview, my diagnosis of the defendent [sic] is Obsessive-compulsive Personality.

It is also my conclusion that the defendent [sic] is capable of understanding the nature of the proceedings against him and of assisting in his own defense.

Although I would agree with Dr. Knight's opinion "that the defendant never intended to commit any offense, and that he was obsessed with a need only to justify his previous behavior", I do not feel that his cognitive or volitional capacities were substantially impaired at the time of the alleged offenses.

In an undated, six-page handwritten letter to Judge Shintaku, received on April 11, 1980, Cowan states in relevant part as follows:

I received your letter of April 1, 1980.

In this letter I want to make it crystal clear to you that I am Defendant Pro Se, and will continue as such.

Mr. Goya is not, and I will not allow him to be, my attorney or representative in any Court, hearing or proceeding.

* * *

To hell with Sandra Alexander and Dr. Golden. You have all along been the wisest person involved in this case. Do *not* send me to Kaneohe—I will resist and waste more time, on principal [sic]. Just release me, I'm ready.

(Emphasis in original.)

Cowan was released from confinement on June 5, 1980.

On May 14, 1980 and July 2, 1980 Cowan wrote hostile letters to Judge Shintaku. In the July 2, 1980 typewritten letter, Cowan stated, "If you continue to ignore me, you will regret it: I will see to that, sooner or later."

On July 10, 1980 a trial was held on HPD Report M-00567 before District Judge Honda (Judge Honda). Cowan

was represented by Deputy Public Defender C. Fukuhara. Cowan was found guilty and sentencing was set for September 16, 1980. Cowan was "ordered not to contact or become involved with complaining witness at her home or place of work during the interim period before sentencing." HPD Report M-00566 was *nolle prosequied*.

On December 30, 1980 Judge Honda sentenced Cowan in HPD Report M-00567 to 90 days in jail but suspended the sentence on the condition that he report to and cooperate with the Court Counseling Service.

On February 13, 1981 Judge Honda, acting in response to Cowan's January 9, 1981 motion, set aside the verdict and judgment in HPD Report M-00567 and ordered a trial *de novo* by jury. The order noted that there was no evidence that Cowan had been advised of his right to a jury trial.

The commitment of HPD Report M-00567 to circuit court as First Circuit Criminal 55545 was signed on March 24, 1981. Private counsel was appointed for Cowan. On July 1, 1981 Circuit Judge Kanbara (Judge Kanbara) granted Cowan's motion to proceed *pro se* with advisory counsel. On December 23, 1981 Judge Kanbara orally granted Cowan's Rule 48(b)(3), Hawaii Rules of Penal Procedure (HRPP), motion to dismiss the charge with prejudice for lack of a speedy trial. The written order was filed on January 18, 1982.

On September 14, 1981, in First Circuit Civil 67329, Cowan filed a ten-count complaint against Robert Belcher (Belcher) and Isaac William Ellison (Ellison) for special, general, and punitive damages allegedly arising out of an altercation on March 28, 1979 between Cowan, Spoone, Ellison, and Belcher.

On March 8, 1982 Civil 57584 was consolidated with Civil 67329.

On June 18, 1982 Cowan filed a Rule 60, HRCF, motion³ asking for relief from everything that occurred in the criminal and civil actions against him because of the alleged violation of his statutory and constitutional rights. This motion was orally denied by Judge Wakatsuki on July 15, 1982. No written order was filed.⁴

On August 25, 1982 Judge Wakatsuki entered a stipulated order setting aside "the judgment of permanent injunction heretofore ordered in Civil No. 57584."

On September 3, 1982 pursuant to Rule 41(a)(1)(B), HRCF, the parties dismissed with prejudice Civil 57584 and Cowan's claims against Ellison in Civil 67329.

On June 7, 1982 Cowan filed an 18-count complaint in First Circuit Civil 71638 against Judge Shintaku, Goya,⁵ the State, Alexander, the City, Kuniyuki, and Dr. Golden. He alleged violations of his constitutional rights and asked for special, general, and punitive damages and a complete expungement of all records in Civil 57584 and Criminal 55545. Goya was not served.

On June 14, 1983 Judge Wakatsuki granted the January 13, 1983 "Motion to Dismiss Complaint or Alternatively for Summary Judgment as Against Defendants State of Hawaii[,], Harold Y. Shintaku, Arnold B. Golden and Lawrence A. Goya" after concluding:

³ In his opening brief at 18, Cowan says this was a Rule 60(b)(4) motion.

⁴ Since there was no written order, there was no final determination. *Price v. Christman*, 2 Haw. App. 212, 629 P.2d 633 (1981); *Dowsett v. Cashman*, 2 Haw. App. 77, 625 P.2d 1064 (1981). Consequently, the oral order cannot be used as a basis for collateral estoppel. See *Urban Renewal Agency of Colby v. Church of Christ*, 211 Kan. 705, 508 P.2d 1227, 1232 (1973); *Lundberg v. Stinson*, 5 Haw. App. 394, 695 P.2d 328, 33 (1985).

⁵ As a deputy public defender, defendant Lawrence A. Goya was a state officer and employee. See Hawaii Revised Statutes § 802-11 (Supp. 1984) and § 802-12 (1976).

1) Plaintiff's cause of action is barred by the statute of limitations and the doctrine of collateral estoppel;

2) Defendants Harold Y. Shintaku, Arnold B. Golden and Lawrence A. Goya are absolutely immune from Plaintiff's suit under the doctrine of judicial and quasi-judicial immunity;

3) Plaintiff's failure to properly serve defendant Lawrence A. Goya in a timely manner warrants dismissal of Plaintiff's cause of action against said defendant;

4) Defendant State of Hawaii is immune from Plaintiff's cause of action under the doctrine of sovereign immunity.

On July 21, 1983 Circuit Judge Chun granted the December 23, 1982 "Motion to Dismiss Complaint Against Sandra Alexander and City and County of Honolulu." The order does not state the grounds for the court's action, but the motion alleged that Cowan's suit was based on 42 U.S.C. § 1983; that "as a deputy prosecutor acting within the scope of her duties" Alexander had absolute immunity; and that there is no *respondeat superior* liability in § 1983 claims.

On September 11, 1984 Cowan stipulated to the dismissal of all of his claims against Kuniyuki in Civil 71638.

On June 4, 1985 Cowan stipulated to the dismissal with prejudice of all of his claims against Belcher in Civil 67329.

I.

Did the lower court abuse its discretion when it dismissed Cowan's complaint against Goya for Cowan's failure to personally serve Goya? Our answer is no.

A suit against a state officer in his individual capacity is a suit against an individual. 4 Wright & Miller, Federal

Practice & Procedure: *Civil* § 1107 (1969). Therefore, the service requirement of Rule 4(d)(1), HRCF, applies. With respect to Goya, this requirement was not satisfied.

Rule 28 of the Rules of the Circuit Court (RCC) (1984), provides:

DISMISSAL FOR WANT OF SERVICE.

A diligent effort to effect service shall be made in all actions, and if no service be made within 6 months after an action has been filed then after notice of not less than 5 days the same may be dismissed.

Although Rule 28, RCC, is to be construed liberally, particularly in cases where there is no prejudice to the other party, its application is based on due diligence. See *Wakuya v. Oahu Plumbing & Sheet Metal, Ltd.*, 2 Haw. App. 373, 379, 636 P.2d 1352, 1357 (1981); 62 Am. Jur. 2d *Process* § 33 (1972) (action may be dismissed where unreasonable and inexcusable delay in service); 24 Am. Jur. 2d *Dismissal* § 51 (1983) (unreasonable and inexcusable delay).

In the instant case, Cowan did not exercise due diligence. The reasons given by Cowan for failing to properly serve Goya in a timely manner were (1) personal reasons; and (2) Goya was on a neighbor island. These reasons are insufficient. Moreover, Cowan failed to move for an extension of time pursuant to Rule 6(b), HRCF.

II.

Did the lower court err in dismissing Cowan's complaint under Rule 12(b)(6), HRCF? Our answer is generally yes and partially no.

In his June 7, 1982 complaint Cowan alleged 18 counts. Many of the 18 counts allege more than one cause of action against more than one defendant.

We construe the lower court's dismissal of Cowan's June 7, 1982 complaint to have been made under Rules 12(b)(6) and 56, HRCF. Upon a review of the record, we conclude that all but one of Cowan's alleged causes of action fail to satisfy Rule 12(b)(6) or are barred by the affirmative defenses of statute of limitations (S/L) or immunity.⁶ Therefore, in subsection A we will count by count outline what causes of action are barred against which defendant and for what reasons. Then, in subsections B and C we will discuss some of the relevant rules of laws.

A.

Count I is directed at Judge Shintaku and the State. It complains that on July 27, 1979 Judge Shintaku convicted Cowan of contempt without appointing counsel for him or notifying him of his right to appeal.

<u>Cause of Action</u>	<u>Defendant</u>	<u>Bar(s)</u>
42 U.S.C. § 1983 (violation of constitutional rights)	Shintaku	Immune
	State	Immune

Count II is directed at Judge Shintaku and the State. It complains about what happened at the August 30, 1979 hearing. It also alleges that Judge Shintaku had a private, slanderous conversation with Cowan's "two attorney bosses" at Goodsill, Anderson and Quinn and as a result Cowan was "banned from working ever again at that office."

<u>Cause of Action</u>	<u>Defendant</u>	<u>Bar(s)</u>
Slander	Shintaku	Immune and S/L (§ 657-4)
	State	Immune (§ 662-15(4)) and S/L (§ 662-4)

⁶ In a 42 U.S.C. § 1983 action, immunity is an affirmative defense. *Davidson v. Scully*, 694 F.2d 50 (2d Cir. 1980).

Count III is directed at all defendants except Dr. Golden and Goya. It complains about what happened at the December 11, 1979 hearing. It alleges a violation of HRS §§ 706-627⁷ and 802-1.⁸ It states that Cowan "asked SHINTAKU to impose the maximum amount of imprisonment *already assessed* against him, in order that he could get the imprisonment *over and done with in one period*, rather than spending weekends in jail for a very long time." It alleges that Alexander assisted Shintaku in making arrangements for Cowan to be jailed.

<u>Cause of Action</u>	<u>Defendant</u>	<u>Bar(s)</u>
42 U.S.C. § 1983 (violation of constitutional rights)	Shintaku	Immune
	Alexander	Immune
	State	Immune

⁷ HRS § 706-627(1) (Supp. 1984) provides as follows:

Notice and hearing on revocation of suspension of sentence or probation, or increasing the conditions thereof; tolling of suspension of sentence or probation. (1) The court shall not revoke a probation or suspension of sentence or increase the requirements imposed thereby on the defendant except after a hearing upon written notice to the defendant of the grounds on which such action is proposed. The defendant shall have the right to hear and controvert the evidence against him, to offer evidence in his defense, and to be represented by counsel.

⁸ HRS § 802-1 (Supp. 1984) provides in relevant part as follows:

Right to representation by public defender or other appointed counsel. Any indigent person who is (1) arrested for, charged with or convicted of an offense or offenses punishable by confinement in jail or prison or for which such person may be or is subject to the provisions of chapter 571; or (2) threatened by confinement, against his will, in any psychiatric or other mental institution or facility; or (3) the subject of a petition for involuntary outpatient treatment under chapter 334 shall be entitled to be represented by a public defender. If, however, conflicting interests exist, or if the public defender for any other reasons is unable to act, or if the interests of justice require, the court may appoint other counsel.

City	12(b)(6) (no allegation of unlawful City policy; no <i>respondeat superior</i> liability)
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Count IV is directed at all defendants except Dr. Golden and Goya. It alleges that Cowan was wrongfully imprisoned from December 11, 1979 until January 28, 1980.

<u>Cause of Action</u>	<u>Defendant</u>	<u>Bar(s)</u>
42 U.S.C. § 1983 (violation of constitutional rights)	Shintaku	Immune
	Alexander	Immune
	State	Immune
	City	12(b)(6) (no allegation of unlawful City policy; no <i>respondeat superior</i> liability)
False imprisonment	Shintaku	Immune
	Alexander	Immune
	State	Immune (§ 662-15(4))
	City	Immune

Count V is directed at all defendants except Goya. It complains about Dr. Golden's allegedly illegal psychiatric examination of Cowan and Dr. Golden's allegedly libellous report of January 8, 1980.⁹

<u>Cause of Action</u>	<u>Defendant</u>	<u>Bar(s)</u>
42 U.S.C. § 1983	Shintaku	Immune

⁹ In his opening brief at 21, Cowan says Dr. Golden is not being sued because of his opinion. He is being sued for his alleged (1) conspiracy to unlawfully imprison Cowan; and (2) refusal to provide Cowan with a copy of the report as allegedly required by HRS § 704-404(6).

(violation of
constitutional rights)

Golden	Immune
Alexander	12(b)(6) (no causation)
State	Immune
City	12(b)(6) (no allegation of unlawful City policy; no <i>respondeat superior</i> liability)
Libel	Golden
	Immune and S/L (§ 657-4)

Count VI is directed at all defendants except Dr. Golden and Goya. It complains that while Cowan was imprisoned jail officials allowed a prisoner to handle Cowan's money account and thus set him up for extortion and assault and battery.

<u>Cause of Action</u>	<u>Defendant</u>	<u>Bar(s)</u>
42 U.S.C. § 1983 (violation of constitutional rights)	Shintaku	12(b)(6) (no causation)
	Alexander	12(b)(6) (no causation)
	State	Immune
	City	12(b)(6) (no allegation of unlawful City policy; no <i>respondeat superior</i> liability)
Negligence	Shintaku	12(b)(6) (no causation)
	Alexander	12(b) (no causation)
	State	S/L (§ 662-4)
	City	12(b)(6) (no allegation of unlawful City policy; no <i>respondeat superior</i> liability and S/L (§ 662-4)

Count VII is directed at all defendants, except Goya,

as conspirators. It complains about what happened at the January 28, 1980 hearing and Cowan's lack of court-appointed counsel.

<u>Cause of Action</u>	<u>Defendant</u>	<u>Bar(s)</u>
42 U.S.C. § 1983 (violation of constitutional rights)	Shintaku	Immune
	Golden	Immune and 12(b)(6) (no causation)
	Alexander	Immune and 12(b)(6) (no causation)
	State City	Immune 12(b)(6) (no allegation of unlawful City policy; no <i>respondeat superior</i> liability)
42 U.S.C. § 1983 (civil conspiracy)	Shintaku	Immune and 12(b)(6)(no allegation of specific facts showing unlawful conspiracy); <i>Hickey v. New Castle County</i> , 428 F.Supp. 606 (D. Del. 1977); <i>Tarkowski v. Robert Bartless Realty Co.</i> , 644 F.2d 1204 (7th Cir. 1980) (more than vague conclusory allegations charging participation in a conspiracy are necessary to state a claim)
	Golden	Immune and 12(b)(6) (no specific facts)
	Alexander	Immune and 12(b)(6) (no specific facts)
	State	Immune

City	12(b)(6) (no specific facts; no <i>respondeat superior</i> liability)
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Count VIII is directed at all defendants, except Goya, as conspirators. It complains about what happened at the January 28, 1980 hearing and the fact that Cowan was not released from jail.

<u>Cause of Action</u>	<u>Defendant</u>	<u>Bar(s)</u>
42 U.S.C. § 1983 (violation of constitutional rights)	Shintaku	Immune
	Golden	Immune
	Alexander	Immune
	State	Immune
	City	12(b)(6) (no allegation of unlawful City policy; no <i>respondeat superior</i> lia- bility)
42 U.S.C. § 1983 (civil conspiracy)	Shintaku	Immune and 12(b)(6) (no specific facts)
	Golden	Immune and 12(b)(6) (no specific facts)
	Alexander	Immune and 12(b)(6) (no specific facts)
	State	Immune
	City	12(b)(6) (no specific facts)

Count IX is directed at all defendants, except Goya, as conspirators. It complains about the assault in the third degree charge against Cowan signed by Alexander on January 21, 1980 and its alleged use as a lever to coerce Cowan to submit to psychiatric treatment or to empanel a panel to examine Cowan.

<u>Cause of Action</u>	<u>Defendant</u>	<u>Bar(s)</u>
Extortion	Alexander	12(b)(6) (no obtaining of money or property)
	City	12(b)(6) (no obtaining of money or property)
Abuse of criminal process	Alexander	12(b)(6) (use of process was authorized)
	City	12(b)(6) (use of process was authorized) and S/L (§ 622-4)
42 U.S.C. § 1983 (violation of constitutional rights)	Shintaku	12(b)(6) (probable cause existed)
	Golden	12(b)(6) (probable cause existed)
	Alexander	Immune and 12(b)(6) (probable cause existed)
	State	Immune
	City	Immune and 12(b)(6) (probable cause existed)
42 U.S.C. § 1983 (civil conspiracy)	Shintaku	12(b)(6) (probable cause existed)
	Golden	12(b)(6) (probable cause existed)
	Alexander	Immune and 12(b)(6) (probable cause existed)
	State	Immune
	City	Immune and 12(b)(6) (probable cause existed)

Count X is directed at all defendants except Goya. It complains about what happened at the February 5, 1980

hearing. It alleges that Cowan was ordered out of the courtroom so that the hearing could be conducted out of his presence. It alleged a violation of HRS § 706-627.

<u>Cause of Action</u>	<u>Defendant</u>	<u>Bar(s)</u>
42 U.S.C. § 1983 (violation of constitutional rights)	Shintaku	Immune
	Golden	Immune and 12(b)(6) (no causation)
	Alexander	Immune and 12(b)(6) (no causation)
	State	Immune
	City	12(b)(6) (no allegation of unlawful City policy; no <i>respondeat superior</i> liability)

Count XI is directed at all defendants, except Goya, as conspirators. It alleges that Cowan was wrongfully imprisoned between February 5, 1980 and June 5, 1980.

<u>Cause of Action</u>	<u>Defendant</u>	<u>Bar(s)</u>
False imprisonment	Shintaku	Immune
	Golden	Immune
	Alexander	Immune
	State	Immune (§ 662-15(4)) and S/L (§ 662-4)
	City	Immune
42 U.S.C. § 1983 (violation of constitutional rights)	Shintaku	Immune
	Golden	Immune
	Alexander	Immune
	State	Immune

	City	Immune and 12(b)(6) (no allegation of unlawful City policy; no <i>respondeat superior</i> liability)
42 U.S.C. § 1983 (civil conspiracy)	Shintaku	Immune and 12(b)(6) (no specific facts)
	Golden	12(b)(6) (no specific facts)
	Alexander	12(b)(6) (no specific facts)
	State	Immune and 12(b)(6) (no <i>respondeat superior</i> liability)
	City	12(b)(6) (no specific facts; no <i>respondeat superior</i> liability)

Count XII is directed at all defendants, except Dr. Golden and Goya, as conspirators. It complains that the mittimus issued on February 5, 1980 states that Cowan was adjudged guilty of civil contempt but that sometime in July 1980 Shintaku told Cowan that he was being "convicted . . . of criminal contempt[.]"

<u>Cause of Action</u>	<u>Defendant</u>	<u>Bar(s)</u>
Fraud	Shintaku	Immune
	Alexander	12(b)(6) (no reliance)
	State	Immune (§ 662-15(4)) and S/L (§ 662-4)
	City	S/L (§ 662-4) and 12(b)(6) (no reliance)
42 U.S.C. § 1983 (violation of constitutional rights)	Shintaku	Immune
	Alexander	Immune and 12(b)(6) (no violation alleged)
	State	Immune

	City	12(b)(6) (no violation alleged)
42 U.S.C. § 1983 (civil conspiracy)	Shintaku	Immune and 12(b)(6) (no violation alleged)
	Alexander	12(b)(6) (no violation alleged)
	State	Immune
	City	12(b)(6) (no violation alleged)

Count XIII is directed at Judge Shintaku and the State. It alleges that Cowan's February 19, 1980 letter was a petition for a writ of habeas corpus which should have been granted.

<u>Cause of Action</u>	<u>Defendant</u>	<u>Bar(s)</u>
42 U.S.C. § 1983 (violation of constitutional rights)	Shintaku	Immune
	State	Immune

Count XIV is directed at all defendants as conspirators. It complains about Judge Shintaku's April 7, 1980 order drafted by Goya that required Cowan to be turned over to the Hawaii State Hospital for the mental examination ordered by District Judge Salz.

<u>Cause of Action</u>	<u>Defendant</u>	<u>Bar(s)</u>
42 U.S.C. § 1983 (violation of constitutional rights)	Shintaku	Immune and 12(b)(6) (no violation alleged)
	Golden	Immune and 12(b)(6) (no violation alleged)
	Alexander	Immune and 12(b)(6) (no violation alleged)
	State	Immune
	City	Immune and 12(b)(6) (no violation alleged)

42 U.S.C. § 1983
(civil conspiracy)

Shintaku	Immune and 12(b)(6) (no violation alleged)
Golden	Immune and 12(b)(6) (no violation alleged)
Alexander	Immune and 12(b)(6) (no violation alleged)
State	Immune
City	Immune and 12(b)(6) (no violation alleged)

Count XV is directed at all defendants as conspirators. It complains that on April 8, 1980 Goya filed in the district court criminal case a "Motion for Mental Examination of Defendant" and gave notice of intention to rely on the defense of mental irresponsibility, whereas Cowan wanted his defense to be based on HRS § 703-306 which authorizes the use of force under certain circumstances.

<u>Cause of Action</u>	<u>Defendant</u>	<u>Bar(s)</u>
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42 U.S.C. § 1983
(civil conspiracy)

Shintaku	
Golden	
Alexander	
State	Immune
City	

Count XVI is the same cause of action as Count XV and is directed at all defendants as conspirators. It complains about the April 8, 1980 "Order for Examination of Defendant and Appointing Examiners" issued in the district court criminal case.

<u>Cause of Action</u>	<u>Defendant</u>	<u>Bar(s)</u>
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42 U.S.C. § 1983
(civil conspiracy)

Shintaku

Golden

Alexander

State Immune

City

Count XVII is directed at all defendants except Goya. It complains about the July 10, 1980 district court trial and conviction of Cowan for assault in the third degree. It alleges malicious prosecution and discriminatory enforcement.

<u>Cause of Action</u>	<u>Defendant</u>	<u>Bar(s)</u>
Malicious prosecution	Shintaku	12(b)(6) (probable cause existed)
	Golden	12(b)(6) (probable cause existed)
	Alexander	12(b)(6) (probable cause existed)
	State	Immune (§ 662-15(4))
	City	12(b)(6) (probable cause existed)
42 U.S.C. § 1983 (violation of constitutional rights)	Shintaku	12(b)(6) (no causation; probable cause existed)
	Golden	12(b)(6) (no causation; probable cause existed)
	Alexander	Immune and 12(b)(6) re malicious prosecution claim (probable cause existed)
	State	Immune
	City	Immune and 12(b)(6) re malicious prosecution claim (probable cause existed)

Count XVIII is directed at all defendants. It complains about the contempt proceedings in Civil 57584. It alleges abuse of civil process and malicious prosecution.

<u>Cause of Action</u>	<u>Defendant</u>	<u>Bar(s)</u>
Malicious prosecution	Shintaku	Immune and 12(b)(6) (probable cause existed)
	Golden	Immune and 12(b)(6) (probable cause existed)
	Alexander	Immune and 12(b)(6) (probable cause existed)
	State	Immune and S/L (§ 662-4)
	City	Immune and S/L (§ 662-4) and 12(b)(6) (probable cause existed)
Abuse of civil process	Shintaku	Immune and 12(b)(6) (use of process was authorized)
	Golden	Immune and 12(b)(6) (use of process was authorized)
	Alexander	Immune and 12(b)(6) (use of process was authorized)
	State	Immune (§ 662-15(4)) and S/L (§ 662-4)
	City	Immune and S/L (§ 662-4) and 12(b)(6) (use of process was authorized)
42 U.S.C. § 1983 (violation of constitutional rights)	Shintaku	Immune and 12(b)(6) (no violation alleged)
	Golden	Immune and 12(b)(6) (no violation alleged)

Alexander	Immune and 12(b)(6) (no violation alleged)
State	Immune
City	Immune and 12(b)(6) (no violation alleged)

B.

Cowan alleged the following causes of action to which the following periods of limitation are applicable.

1. Fraud: 6 years.

—HRS § 657-1(4) (1976).

—*See Au v. Au*, 63 Haw. 210, 626 P.2d 173 (1981).

Fraud by the State or City: 2 years.

—HRS § 662-4 (1976).

—*See, e.g., Waugh v. University of Hawaii*, 63 Haw. 117, 621 P.2d 957 (1980) (State); *Orso v. City & County of Honolulu*, 56 Haw. 241, 534 P.2d 489 (1975) (City).

2. Slander: 2 years.

—HRS § 657-4.

—*Hoke v. Paul*, 65 Haw. 478, 653 P.2d 1155 (1982).

Slander by the State: 2 years.

—HRS § 662-4 (1976).

—*See, e.g., Waugh v. University of Hawaii*, 63 Haw. 117, 621 P.2d 957 (1980).

3. False imprisonment: 6 years.

—HRS § 657-1(4) (1976).

—*Au v. Au*, 63 Haw. 210, 626 P.2d 173 (1981).

False imprisonment by the State or City: 2 years.

—HRS § 662-4 (1976).

—*See, e.g., Waugh v. University of Hawaii*, 63 Haw. 117, 621 P.2d 957 (1980) (State); *Orso v. City & County of Honolulu*, 46 Haw. 241, 534 P.2d 489 (1975) (City).

4. Abuse of criminal process: 6 years.

—HRS § 657-1(4) (1976).

- Au v. Au*, 63 Haw. 210, 626 P.2d 173 (1981).
- Abuse of criminal process by the State or City: 2 years.
- HRS § 662-4 (1976).
- See, e.g., Waugh v. University of Hawaii*, 63 Haw. 117, 621 P.2d 957 (1980) (State); *Orso v. City & County of Honolulu*, 56 Haw. 241, 534 P.2d 489 (1975) (City).
- 5. Abuse of civil process: 6 years.
- HRS § 657-1(4) (1976).
- Au v. Au*, 63 Haw. 210, 626 P.2d 173 (1981).
- Abuse of civil process by State or City: 2 years.
- HRS § 662-4 (1976).
- See, e.g., Waugh v. University of Hawaii*, 63 Haw. 117, 621 P.2d 957 (1980) (State); *Orso v. City & County of Honolulu*, 56 Haw. 241, 534 P.2d 489 (1975) (City).
- 6. Malicious prosecution: 6 years.
- HRS § 657-1(4) (1976).
- Malicious prosecution by the State or City: 2 years.
- Au v. Au*, 63 Haw. 210, 626 P.2d 173 (1981).
- HRS § 662-4(1976).
- See, e.g., Waugh v. University of Hawaii*, 63 Haw. 117, 621 P.2d 957 (1980) (State); *Orso v. City & County of Honolulu*, 56 Haw. 241, 534 P.2d 489 (1975) (City).
- 7. Negligence by the State: 2 years.
- HRS § 662-4 (1976).
- See, e.g., Waugh v. University of Hawaii*, 63 Haw. 117, 621 P.2d 957 (1980).
- 8. 42 U.S.C. § 1983: 6 years.
- HRS § 657-1(4) (1976).
- Lai v. City & County of Honolulu*, 749 F.2d 588 (9th Cir. 1984).

C.

The following absolute or qualified immunities are applicable in this case.

1. JUDGE SHINTAKU.

a. Hawaii Law.

Judges are absolutely immune from civil liability for their judicial actions, including erroneous orders, unless committed in the clear absence of all jurisdiction. *State v. Taylor*, 49 Haw. 624, 425 P.2d 1014 (1967). See *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 20 L.Ed. 646 (1872).

A judicial officer is immune from actions for libel or slander for words written or spoken during the course of a judicial proceeding over which he or she is presiding and made in relation to the subject of the proceeding as these words are absolutely privileged. See 50 Am. Jur. 2d *Libel and Slander* § 242 (1970).

b. 42 U.S.C. § 1983.

Judges are absolutely immune from damage liability under § 1983 for acts performed within their judicial capacities unless committed in clear absence of jurisdiction. *Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978); *Pierson v. Ray*, 386 U.S. 547, 553-554, 87 S.Ct. 1213, 1217, 18 L.Ed.2d 288 (1967); *Ashelman v. Pope*, No. 84-1580 (9th Cir. July 8, 1986). Judges are not liable for acts merely in excess of jurisdiction even when done maliciously, see *Rankin v. Howard*, 633 F.2d 844 (9th Cir. 1980), and the fact that a judge commits grave procedural errors and fails to adhere to procedural rules established by statute is not sufficient to deprive a judge of absolute immunity. *Beard v. Udall*, 648 F.2d 1264, 1269 (9th Cir. 1981).

To determine if a given action is judicial, . . . courts focus on whether (1) the precise act is a normal judicial function; (2) the events occurred in the judge's chambers; (3) the controversy centered around a case then pending before the judge; and (4) the events at

issue arose directly and immediately out of a confrontation with the judge in his or her official capacity. . . . These factors are to be construed generously in favor of the judge and in light of the policies underlying judicial immunity. . . .

To determine if the judge acted with jurisdiction, courts focus on whether the judge was acting clearly beyond the scope of subject matter jurisdiction in contrast to personal jurisdiction. . . . Where not clearly lacking subject matter jurisdiction, a judge is entitled to immunity even if there was no personal jurisdiction over the complaining party. . . . Jurisdiction should be broadly construed to effectuate the policies supporting immunity. *Ashelman v. Pope*, No 84-1580, 9th Cir. July 8, 1986.

2. THE STATE.

a. Hawaii Law.

HRS §§ 662-2, -15 provide in relevant part:

§662-2 Waiver and liability of State. The State hereby waives its immunity for liability for the torts of its employees and shall be liable in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

§662-15 Exceptions. This chapter shall not apply to:

- (1) Any claim based upon an act or omission of an employee of the State, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state officer or employee, whether or not the discretion involved has been abused;

* * *

(4) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights[.]

Pursuant to these provisions, the State may be held liable for the tortious acts of its employees under the doctrine of *respondeat superior*, *Hulsman v. Hemmeter Development Corp.*, 65 Haw. 58, 647 P.2d 713 (1982), unless expressly exempted under HRS § 662-15.

Under HRS § 662-15, the State has retained its immunity with respect to the enumerated claims. *See Figueroa v. State*, 61 Haw. 369, 384, 604 P.2d 1198, 1207 (1979). *See also Upchurch v. State*, 51 Haw. 150, 152, 454 P.2d 112, 114 (1969).

If the particular employee-official has immunity from suit, the employer-State is also immune. *Hulsman, supra*.

The State is immune from defamation actions. *See Mitsuba Publishing Co. v. State*, 1 Haw. App. 517, 620 P.2d 771 (1980).

Under the provisions of HRS chapter 662, the State has not waived its sovereign immunity and is absolutely immune from suits by private individuals for money damages for violation of constitutional rights. *Figueroa v. State, supra*.

b. 42 U.S.C. § 1983.

§ 1983 will not support a claim based on a *respondeat superior* theory of liability. *Monell v. New York City Department of Social Services*, 436 U.S. 658, 670, 71, 694, 98 S.Ct. 2018, 2037, 38, 56 L.Ed.2d 611, 638-639 (1978); *see Makanui v. Department of Education*, 6 Haw. App. ____ (No. 10851, July 14, 1986).

The State cannot be sued under § 1983 unless it has consented to be sued or has otherwise waived its sovereign immunity. See *Quern v. Jordan*, 440 U.S. 332, 341, 99 S.Ct. 1139, 1144-45, 59 L.Ed.2d 358, 366-67 (1979); 15 Am. Jur. 2d *Civil Rights* § 268 (1985). It has done neither. See *Makanui v. Department of Education*, *supra*.

3. DR. GOLDEN

a. Hawaii Law.

Court-appointed psychiatrists are entitled to absolute judicial immunity in the performance of their duties, even if negligent. *Siebel v. Kemble*, 63 Haw. 516, 527, 631 P.2d 173, 180 (1982).

b. 42 U.S.C. § 1983.

Court-appointed psychiatrists who prepare and submit medical reports to state court are absolutely immune from liability for damages under § 1983 pursuant to the doctrine of "quasi-judicial immunity" for acts committed "in the performance of an integral part of the judicial process." *Burkes v. Callion*, 433 F.2d 318, 319 (9th Cir. 1970).

4. ALEXANDER.

a. Hawaii Law.

As a non-judicial governmental officer, a prosecuting attorney is entitled to qualified immunity from liability for her tortious acts and may be subject to liability for damages if in exercising her discretion she is motivated by malice, and not by an otherwise proper purpose. *Orso v. City & County of Honolulu*, 56 Haw. 241, 247, 248, 534 P.2d 489 (1975); see also *Medeiros v. Kondo*, 55 Haw. 499, 522 P.2d 1269 (1974); *Lane v. Yamamoto*, 2 Haw. App. 176, 628 P.2d 634 (1981).

Plaintiff has the burden of establishing by clear and convincing evidence that the officer was motivated by

malice and not by an otherwise proper purpose. *Medeiros, supra*.

b. 42 U.S.C. § 1983.

A prosecutor who acts within the scope of his or her authority in initiating and pursuing a criminal prosecution and in presenting the state's case is absolutely immune from civil liability for damages for alleged deprivations of constitutional rights under § 1983 even if undertaken maliciously. *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976); *Ashelman v. Pope, supra*; see *Annot.*, 67 A.L.R. Fed. 640 (1984).

The proper test for determining scope of authority is whether the prosecutor performed the kind of act not manifestly or palpably beyond authority, but rather having more or less connection with the general matters committed to his control or supervision. *Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675, 678 (9th Cir. 1984).

Under *Imbler v. Pachtman, supra*, a prosecutor's decision to initiate a criminal prosecution is entitled to absolute immunity, and a prosecutor is absolutely immune from a claim for deprivation of equal protection of the laws through selective prosecution and participation in invidious discrimination. See, e.g., *Maxfield v. Thomas*, 557 F.Supp. 1123, 1130, 1131 (D. Idaho 1983).

Under § 1983, a prosecutor enjoys only qualified immunity for actions taken in an administrative or investigative capacity rather than that of an advocate. See *Beard v. Udall*, 648 F.2d 1264, 1276, n. 8 (9th Cir. 1981).

5. CITY

a. Hawaii Law.

Immunities retained in HRS §§ 662-15(1) and (4) (1976) are not applicable to the City & County of Honolulu. *Orso v. City & County of Honolulu*, 56 Haw. 241, 534

P.2d 489 (1975). The City & County of Honolulu is liable for the tortious conduct of its prosecuting attorney under the doctrine of *respondeat superior*. *Orso v. City & County of Honolulu*, *supra*. However, if the employee prosecuting attorney is immune from suit, the employer City & County of Honolulu is also immune. *Hulsman v. Hemmeter Dev. Corp.*, 65 Haw. 58, 647 P.2d 713 (1982).

b. 42 U.S.C. § 1983.

A municipality cannot be held liable under § 1983 on a theory of *respondeat superior*. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037-38, 56 L.Ed.2d 611, 638 (1978). A municipality may only be held liable for constitutional deprivations under § 1983 where the deprivation is caused by its policies or customs, whether made by its law-makers or by "those whose edicts or acts may fairly be said to represent official policy that inflicts the injury." *Id.* 436 U.S. at 694, 98 S.Ct. at 2037-38, 56 L.Ed.2d at 638. It enjoys no immunity from damages under § 1983. *Owen v. City of Independence*, 445 U.S. 622, 657, 100 S.Ct. 1398, 1418, 63 L.Ed.2d 673, 697 (1980); *see, e.g., Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675, 681 (9th Cir. 1984).

Under § 1983, a single decision by an official to take a particular course of action may constitute official policy for purposes of establishing a city's liability if made by an authorized municipal policy maker. *See Pembaur v. City of Cincinnati*, 475 U.S. _____, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) (single decision made by prosecutor) (municipal liability attaches where a deliberate choice to follow a course of action is made from various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question).

III.

Based on the foregoing discussion, the immunity defense is not available to Judge Shintaku, Dr. Golden, Alexander, and the City regarding Counts XV and XVI which allege a § 1983 conspiracy by them together with Goya to have Cowan assert, despite his objection, a mental irresponsibility defense in the district court criminal case so that Cowan could be subjected to a psychiatric examination by court-appointed doctors under HRS § 704-404.

Therefore, only the following counts and causes of action were erroneously dismissed:

<u>Cause of Action</u>	<u>Count</u>	<u>Defendant</u>
42 U.S.C. § 1983 (civil conspiracy)	XV	—Judge Shintaku —Dr. Golden —Alexander —City
	XVI	—Judge Shintaku —Dr. Golden —Alexander —City

As noted previously, however, Counts XV and XVI together constitute only one cause of action.

CONCLUSION

Accordingly, we affirm the lower court's June 14, 1983 and July 21, 1983 orders dismissing Cowan's complaint for damages with respect to all counts, causes of action, and defendants except as specifically stated in section III above. We vacate the lower court's June 14, 1983 and July 21, 1983 orders of dismissal with respect to the counts, causes of action, and defendants stated in section III above.

DATED: Honolulu, Hawaii, September 22, 1986.

/s/JAMES S. BURNS

/s/WALTER M. HEEN

/s/HARRY T. TANAKA

DONALD D. COWAN, appellant
pro se.

RUSSELL A. SUZUKI, DEPUTY
Attorney General for
appellees State, Shintaku,
Golden, and Goya.

STEPHEN H. LEVINS, DEPUTY
Corporation Counsel for
appellees City & County
and Alexander

APPENDIX C

No. 10256

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

DONALD D. COWAN,

CIVIL NO. 71638

Plaintiff-Appellant,

v.

STATE OF HAWAII, CITY AND
COUNTY OF HONOLULU,
HAROLD Y. SHINTAKU, SANDRA
ALEXANDER, ARNOLD B.
GOLDEN and LAWRENCE A.
GOYA,

Defendants-Appellees,

and

KEN T. KUNIYUKI,

Defendant.

FILED
1986 OCT 3 PM 3:53
DARRELL M. PHILLIPS
CLERK INTERMEDIATE
COURT OF APPEALS

ORDER DENYING APPELLEES' MOTION FOR
RECONSIDERATION

I.

Defendants-appellees Harold Shintaku and Dr. Arnold B. Golden move for reconsideration of our holding that Counts XV and XVI are not barred by the applicable statute of limitations.

Movants note that in *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985), the United States

Supreme Court held that all claims under 42 U.S.C. § 1983 are characterizable as personal injury claims. Under that rule, the applicable statute of limitations would be two years under Hawaii Revised Statutes (HRS) § 657-7 (1976) rather than six years under HRS § 657-1(4) (1976).

Movants further note that in *Mulligan v. Hazard*, 777 F.2d 340 (6th Cir. 1985), the Sixth Circuit Court held that the *Wilson v. Garcia* rule would be applied retroactively. Inexplicably, movants do not note that in *United States v. Claiborne*, 781 F.2d 1334 (9th Cir. 1986), the Ninth Circuit Court held that the *Wilson v. Garcia* rule would not be applied retroactively to claims that were filed before *Wilson v. Garcia* was decided on April 17, 1985.

Since we find the *United States v. Claiborne* opinion more persuasive than the *Mulligan v. Hazard* opinion, and since Hawaii is within the Ninth Circuit and not the Sixth Circuit, we apply the rule in *United States v. Claiborne* rather than the rule in *Mulligan v. Hazard*.

II.

Movants further contend that their alleged activity under Counts XV and XVI was not undertaken in the "clear absence of all jurisdiction." *Stump v. Sparkman*, 435 U.S. 349, 357, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978). They contend that we "have overlooked the Circuit Court's general authority to have determined at the threshold whether [Cowan] was competent to exercise his asserted rights to run his criminal defense, see *Faretta v. California*, 422 U.S. 806 [95 S.Ct. 2525, 45 L.Ed.2d 562] (1975)." We disagree.

Counts XV and XVI allege that movants and others, who were involved in Spooner's circuit court civil case against Cowan, conspired to have Cowan's attorney in the district court criminal case against Cowan rely on the defense of mental irresponsibility which Cowan alleges he did not want to rely on rather than on the defense of the

authorized use of force which Cowan alleges he wanted to rely on. Consequently, on the record before us, we cannot hold as a matter of law that movant's alleged activity was not undertaken in the clear absence of all jurisdiction.

Accordingly, the October 1, 1986 motion for reconsideration by defendants-appellees Harold Shintaku and Dr. Arnold B. Golden is hereby denied.

DATED: Honolulu, Hawaii, October 8, 1986

/s/ JAMES S. BURNS
/s/ WALTER M. HEEN
/s/ HARRY T. TANAKA

Steven S. Michaels and
Russell A. Suzuki, Deputy
Attorneys General, on the
motion for appellees Shintaku
and Golden.

APPENDIX D

NO. 10256

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

DONALD D. COWAN,

CIVIL NO. 71638

Plaintiff-Appellant,

v.

STATE OF HAWAII, CITY AND
COUNTY OF HONOLULU,
HAROLD Y. SHINTAKU, SANDRA
ALEXANDER, ARNOLD B.
GOLDEN and LAWRENCE A.
GOYA,

Defendants-Appellees,

and

KEN T. KUNIYKI,

Defendant.

FILED

1986 OCT 8 PM 3:57

**DARRELL M. PHILLIPS
CLERK INTERMEDIATE
COURT OF APPEALS**

**ORDER DENYING APPELLANT'S MOTION FOR
RECONSIDERATION**

Plaintiff-appellant's motion for reconsideration, filed on October 6, 1986, having been considered by this court is hereby denied.

DATED: Honolulu, Hawaii, October 8, 1986.
Donald D. Cowan, plaintiff-
appellant pro se on the
motion.

/s/ JAMES S. BURNS
/s/ WALTER M. HEEN
/s/ HARRY T. TANAKA

APPENDIX E

NO. 10256

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

DONALD D. COWAN,

CIVIL NO. 71638

Plaintiff-Appellant,

v.

STATE OF HAWAII, CITY AND
COUNTY OF HONOLULU,
HAROLD Y. SHINTAKU, SANDRA
ALEXANDER, ARNOLD B.
GOLDEN and LAWRENCE A.
GOYA,

Defendants-Appellees,

and

KEN T. KUNIYUKI,

Defendant.

APPEAL FROM THE CON-
CLUSIONS OF LAW AND
ORDER GRANTING MOTION
TO DISMISS COMPLAINT OR
ALTERNATIVELY FOR
SUMMARY JUDGMENT AS
AGAINST DEFENDANTS
STATE OF HAWAII, HAR-
OLD Y. SHINTAKU, ARNOLD
B. GOLDEN AND LAW-
RENCE A. GOYA, FILED
JUNE 14, 1983; AND ORDER
GRANTING MOTION TO DIS-
MISS COMPLAINT AGAINST
SANDRA ALEXANDER AND
CITY AND COUNTY OF HON-
OLULU, FILED JULY 21,
1983

FIRST CIRCUIT COURT

HONORABLE JAMES H.
WAKATSUKI

HONORABLE PHILIP T.
CHUN

JUDGES

FILED

1986 OCT 8 PM 3:49

DARRELL M. PHILLIPS
CLERK INTERMEDIATE
COURT OF APPEALS

ORDER OF AMENDMENT

The memorandum opinion of the court, filed on September 22, 1986, is hereby amended as follows: At page 13, the two-paragraph quotation following the sentence "Dr. Goldman reported in relevant part as follows:" is deleted and replaced with the following:

At the time of the alleged offense, it is the opinion of this writer that the defendant was not suffering from a mental disease, disorder or defect, and therefore his cognitive and volitional capacities were in no way diminished.

The defendant showed substantial naivety, obsessive features, but no ongoing psychosis. There is a neurotic process based on his adamant position-taking, but nothing to suggest that defendant lacked control of any of the mental faculties necessary to conform his behavior to the confines of law. Other than the unwillingness to be compromised, and the extreme means by which the defendant chose to assert his independence from both rejection and pressure from others, there is little to support Dr. Golden's opinion of delusional process or paranoid state.

The clerk of the court is directed to incorporate the foregoing change in the original opinion.

DATED: Honolulu, Hawaii, October 8, 1986.

/s/ JAMES S. BURNS

/s/ WALTER M. HEEN

/s/ HARRY T. TANAKA

Donald D. Cowan, appellant,
pro se.

Russell A. Suzuki, Deputy
Attorney General, for
appellees State, Shintaku,
Golden, and Goya.

Stephen H. Levins, Deputy
Corporation Counsel, for
appellees City & County
and Alexander.

APPENDIX F

NO. 10256

IN THE SUPREME COURT OF THE STATE OF HAWAII

DONALD D. COWAN,

CIVIL NO. 71638

Respondent-Appellant,

APPLICATION FOR WRIT OF
CERTIORARI

vs.

STATE OF HAWAII, HAROLD Y.
SHINTAKU, ARNOLD B. GOLDEN
and LAWRENCE A. GOYA,

INTERMEDIATE COURT OF
APPEALS

Petitioners-Appellees,

HONORABLE JAMES S.
BURNS, WALTER M. HEEN
AND HARRY T. TANAKA,
JUDGES

and

CITY AND COUNTY OF
HONOLULU and SANDRA
ALEXANDER,

Defendants-Appellees,

and

KEN T. KUNIYUKI,

Defendant.

FILED

1986 OCT 30 AM 10:47

DARRELL M. PHILLIPS
CLERK SUPREME COURT

ORDER

Petitioners State, Shintaku, Golden and Goya's Application for Writ of Certiorari filed October 20, 1986 is hereby granted.

Each party may, but need not, file a supplemental brief with respect to the issues raised in the application for certiorari. Any such brief shall contain no more than 15 pages and shall be filed no later than 30 days after the date of this order.

DATED: Honolulu, Hawaii, October 30, 1986.

FOR THE COURT:

/s/ H. LUM
Chief Justice

Steven S. Michaels and
Russell A. Suzuki,
Deputy Attorneys General,
for the Writ

APPENDIX G

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 State of Hawaii

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Attorneys for Defendants
 State of Hawaii, Harold Y.
 Shintaku, Arnold B. Golden
 and Lawrence A. Goya

1ST CIRCUIT COURT
 STATE OF HAWAII
 FILED
 1983 JUNE 14 AM 7:56
B. NAKAMAEJO
 CLERK

IN THE CIRCUIT COURT
 OF THE FIRST CIRCUIT
 STATE OF HAWAII

DONALD D. COWAN,

Plaintiff

vs.

STATE OF HAWAII, CITY AND
 COUNTY OF HONOLULU,
 HAROLD Y. SHINTAKU, SANDRA
 ALEXANDER, KEN T. KUNTYUKI,
 ARNOLD B. GOLDEN,
 LAWRENCE A. GOYA,

Defendants.

CIVIL NO. 71638

CONCLUSION OF LAW AND
 ORDER GRANTING MOTION
 TO DISMISS COMPLAINT OR
 ALTERNATIVELY FOR
 SUMMARY JUDGMENT AS
 AGAINST DEFENDANTS
 STATE OF HAWAII, HAR-
 OLD Y. SHINTAKU, ARNOLD
 B. GOLDEN AND LAW-
 RENCE A. GOYA

**CONCLUSIONS OF LAW AND ORDER GRANTING
MOTION TO DISMISS COMPLAINT OR
ALTERNATIVELY FOR SUMMARY JUDGMENT AS
AGAINST DEFENDANTS STATE OF HAWAII HAROLD
Y. SHINTAKU, ARNOLD B. GOLDEN AND LAWRENCE
A. GOYA**

The Motion To Dismiss Complaint Or Alternatively For Summary Judgment As Against Defendants State of Hawaii, Harold Y. Shintaku, Arnold B. Golden And Lawrence A. Goya came on for hearing on Friday, March 18, 1983 before the Honorable James H. Wakatsuki, judge of the above-entitled Court. The Court, having reviewed the records and files herein, the memoranda of law submitted by the parties, and the arguments presented at the hearing, concludes as follows:

1) Plaintiff's cause of action is barred by the statute of limitations and the doctrine of collateral estoppel;

2) Defendants Harold Y. Shintaku, Arnold B. Golden and Lawrence A. Goya are absolutely immune from Plaintiff's suit under the doctrine of judicial and quasi-judicial immunity;

3) Plaintiff's failure to properly serve defendant Lawrence A. Goya in a timely manner warrants dismissal of Plaintiff's cause of action against said defendant;

4) Defendant State of Hawaii is immune from Plaintiff's cause of action under the doctrine of sovereign immunity.

Now, therefore, based upon the above-stated conclusions of law, IT IS HEREBY ORDERED:

a) That the Motion To Dismiss Complaint Or Alternatively For Summary Judgment As Against Defendants State of Hawaii, Harold Y. Shintau, Arnold B. Golden and Lawrence A. Goya be and the same is hereby granted;

b) Accordingly, that Plaintiff's complaint be and the same is dismissed as against said defendants with prejudice.

DATED: Honolulu, Hawaii, JUN 13 1983.

/s/J. WAKATSUKI

Judge of the above-entitled Court

APPROVED AS TO FORM:

/s/COLLEEN K. HIRAI

COLLEEN K. HIRAI

Deputy Corporation Counsel
Counsel for Defendants City
and County of Honolulu and
Sandra Alexander

/s/DONALD D. COWAN

DONALD D. COWAN

Plaintiff Pro Se

APPENDIX H

GARY M. SLOVIN, 1414
Corporation Counsel
 COLLEEN K. HIRAI, 2142
Deputy Corporation Counsel
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 Honolulu, Hawaii 96813
 Telephone: 523-4702

Attorneys for Defendants
 City and County of Honolulu
 and Sandra Alexander

1ST CIRCUIT COURT
 STATE OF HAWAII
 FILED
 1983 JUL 21 AM 8:00
B. CHO
 CLERK

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
 STATE OF HAWAII

DONALD D. COWAN,

Plaintiff,

vs.

STATE OF HAWAII, CITY AND
 COUNTY OF HONOLULU,
 HAROLD Y. SHINTAKU, SANDRA
 ALEXANDER, KEN T. KUNUYUKI,
 ARNOLD B. GOLDEN,
 LAWRENCE A. GOYA,

Defendants.

Civil No. 71638

ORDER GRANTING MOTION
 TO DISMISS COMPLAINT
 AGAINST SANDRA ALEX-
 ANDER AND CITY AND
 COUNTY OF HONOLULU

**ORDER GRANTING MOTION TO DISMISS COMPLAINT
AGAINST SANDRA ALEXANDER AND CITY AND
COUNTY OF HONOLULU**

Defendants SANDRA ALEXANDER and CITY AND COUNTY OF HONOLULU's Motion to Dismiss Complaint Against Sandra Alexander and City and County of Honolulu having come on for hearing on July 6, 1983, and the Court having read the memoranda, heard the arguments of counsel, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion to Dismiss Complaint Against Sandra Alexander and City and County of Honolulu be and is hereby granted.

DATED: Honolulu, Hawaii, JUL 20 1983.

/s/PHILIP T. CHUN

Judge of the above-entitled Court

APPROVED AS TO FORM:

/s/DONALD D. COWAN

DONALD D. COWAN

250 South Hotel Street, #4060

Honolulu, Hawaii 96813

Plaintiff Pro Se

APPENDIX I

NO. 10256

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

DONALD D. COWAN,

Plaintiff-Appellant,

vs.

STATE OF HAWAII, CITY AND
COUNTY OF HONOLULU,
HAROLD Y. SHINTAKU, SANDRA
ALEXANDER, ARNOLD B.
GOLDEN and LAWRENCE A.
GOYA,

Defendants-Appellees,

and

KEN T. KUNIYUKI,

Defendant.

CIVIL NO. 71638

APPEAL FROM THE CON-
CLUSIONS OF LAW AND
ORDER GRANTING MOTION
TO DISMISS COMPLAINT OR
ALTERNATIVELY FOR
SUMMARY JUDGMENT AS
AGAINST DEFENDANTS
STATE OF HAWAII, HAR-
OLD Y. SHINTAKU, ARNOLD
B. GOLDEN AND LAW-
RENCE A. GOYA, FILED
JUNE 14, 1983; AND ORDER
GRANTING MOTION TO DIS-
MISS COMPLAINT AGAINST
SANDRA ALEXANDER AND
CITY AND COUNTY OF HON-
OLULU, FILED JULY 21,
1983

FIRST CIRCUIT COURT

HONORABLE JAMES H.
WAKATSUKI HONORABLE
PHILIP T. CHUN JUDGES

FILED

1987 JUN 30 AM 10 41

Darrell M. Phillips
CLERK INTERMEDIATE
COURT OF APPEALS

JUDGMENT ON APPEAL

Pursuant to the Memorandum Opinion of the Intermediate Court of Appeals of the State of Hawaii, filed on September 22, 1986 and the Order of Amendment filed on October 8, 1986, the lower court's June 14, 1983 and July 21, 1983 orders dismissing Copwan's complaint for damages with respect to all counts, causes of action, and defendants except as specifically stated in section III of said Memorandum Opinion are affirmed and the lower court's June 14, 1983 and July 21, 1983 orders of dismissal with respect to the counts, causes of action, and defendants stated in Section III of said Memorandum Opinion are vacated.

Dated: Honolulu, Hawaii JUN 30 1987.
BY THE COURT:

/s/DARRELL M. PHILLIPS
CLERK

APPROVED:

/s/JAMES BURNS
JUDGE

APPENDIX J

NO. 10256

**IN THE SUPREME COURT OF
THE STATE OF HAWAII**

DONALD D. COWAN,

CIVIL NO. 71638

Respondent-Appellant,

**MOTION FOR RECONSIDER-
ATION**

vs.

STATE OF HAWAII, HAROLD Y.
SHINTAKU, ARNOLD B. GOLDEN
and LAWRENCE A. GOYA,

Petitioners-Appellees,

and

CITY AND COUNTY OF
HONOLULU and SANDRA
ALEXANDER,

Respondents-Appellees.

and

KEN T. KUNIYUKI,

Defendant.

FILED

1987 JUL 10 PM 2:50

EUGENE L. SABADO

CLERK SUPREME COURT

ORDER DENYING RECONSIDERATION*

In this case, at the time we granted certiorari, we did so because the State, in its application for certiorari, represented:

*Circuit Judge Chang, who was assigned to decide this case, retired from the court on June 30, 1987. The case is being decided by the remaining justices pursuant to HRS § 602-10.

In the alternative, given that *Garcia's* retroactivity will be decided by the Supreme Court on review of *Al-Khazraji v. St. Francis College*, 784 F.2d 505, 514 (3rd Cir.), *cert. granted sub nom. St. Francis College v. Al-Khazraji Majid*, No. 85-2169, 55 U.S.L.W. 3231 (U.S. Oct. 6, 1986); *see* 55 U.S.L.W. 3198 (questions presented), this Court should grant certiorari pending a disposition in No. 85-2169, in order to relieve the Supreme Court of the burden of correcting manifest error if *St. Francis College* is reversed.

When *St. Francis* was affirmed, we issued the order complained of and the appellees now want us to consider different points.¹ We decline to do so.

Reconsideration denied.

DATED: Honolulu, Hawaii, July 10, 1987.

/s/H. Lum

/s/Edward H. Nakamura

/s/Frank Padgett

/s/Yoshimi Hayashi

Steven S. Michaels and
Russell A. Suzuki,
Deputy Attorneys General,
on the motion

¹ The denial or granting of certiorari is a discretionary matter and no motion for reconsideration can be filed under our rules.

APPENDIX K

No. 10256

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1964

DONALD D. COWAN

Civil No. 71638

Plaintiff-Appellant

vs.

STATE OF HAWAII, CITY AND
COUNTY OF HONOLULU,
HAROLD Y. SHINTAKU, SANDRA
ALEXANDER, ARNOLD B.
GOLDEN and LAWRENCE A.
GOYA

Defendants-Appellees,

and

KEN T. KUNIYUKI,

Defendant.

APPEAL FROM THE CON-
CLUSIONS OF LAW AND
ORDR GRANTING MOTION
TO DISMISS COMPLAINT OR
ALTERNATIVELY FOR
SUMMARY JUDGMENT AS
AGAINST DEFENDANTS
STATE OF HAWAII, HAR-
OLD Y.SHINTAKU, ARNOLD
B. GOLDEN AND LAW-
RENCE A. GOYA, FILED
JUNE 14, 1983; AND ORDER
GRANTING MOTION TO DIS-
MISS COMPLAINT AGAINST
SANDRA ALEXANDER AND
CITY AND COUNTY OF HON-
OLULU, FILED JULY 21,
1983

FIRST CIRCUIT COURT

HONORABLE JAMES H.
WAKATSUKI
Judge

HONORABLE PHILIP T. CHUN
Judge

65a

**ANSWERING BRIEF ON BEHALF OF
DEFENDANTS-APPELLEES**

and

CERTIFICATE OF SERVICE

FILED

1985 AUG 12 P.M. 2:40

EUGENE L. SABADO

CLERK SUPREME COURT

CORINNE K. A. WATANABE 1429

Attorney General

State of Hawaii

RUSSELL A. SUZUKI 2084

Deputy Attorney General

State of Hawaii

Attorneys for Defendants-Appellees

**State of Hawaii, Harold Y. Shintaku, Arnold B. Golden
and Lawrence A. Goya**

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[MATERIAL DELETED IN PRINTING]

II. STANDARD OF REVIEW

Appellate review of a trial court's conclusions of law is to be conducted on a *de novo* basis. *Clarkin v. Reiman*, 2 Haw. App. 618, 624, 638 P.2d 857 (1981). 9 Wright & Miler, *Federal Practice and Procedure* Civil §2588 (1971).

III. JURISDICTIONAL STATEMENT

The basis for jurisdiction in the circuit court is section 603-21.5(3), Hawaii Revised Statutes. The basis for jurisdiction in the Supreme Court is section 602-5(1), Hawaii Revised Statutes. The circuit court order from which Appellant appeals was entered on June 14, 1982 (ROA, Vol III, p. 6). Final order as to all defendants was entered on September 11, 1984 (ROA, Vol III, pp. 31-32). Notice of Appeal was timely filed on October 10, 1984 (ROA, Vol III pp. 45-53).

IV. COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

A. Did the circuit court commit reversible error by granting Defendants-Appellees' Motion To Dismiss Complaint or Alternatively For Summary Judgment?

1. Did the circuit court err in concluding that Appellant's action is barred by the statute of limitations and the doctrine of collateral estoppel?

2. Did the circuit court err in concluding that judges, court appointed psychiatrists, and court appointed public defenders are entitled to judicial and quasi-judicial immunity from suit?

3. Did the circuit court err in concluding that Appellant's failure to serve Appellee Lawrence A. Goya warranted dismissal of Appellant's action against him?

4. Did the circuit court err in concluding that the state is immune from suit under the doctrine of sovereign immunity?

V. COUNTERSTATEMENT OF CASE

Plaintiff-Appellant Donald D. Cowan has filed this appeal seeking a review of the circuit court's Conclusions of Law and Order Granting Motion To Dismiss Complaint or Alternatively For Summary Judgment. (ROA, Vol. III, pp. 4-5).

By complaint filed on June 7, 1982, Appellant filed suit in the First Circuit Court against Defendants-Appellees State of Hawaii, Harold Y. Shintaku, then a judge of the First Circuit Court, Arnold B. Golden, M.D., a psychiatrist appointed by the circuit court to examine Appellant, and Lawrence A. Goya, Esq., a deputy public defender who was appointed by the district court to represent Appellant on an assault charge. Appellant's complaint also names as defendants Sandra Alexander, Esq., the City and County of Honolulu and Ken T. Kuniyuki, Esq. Appellant's complaint sought recovery of personal injury damages he alleged resulted from the tortious conduct of Appellees during judicial proceedings in which he was a defendant in *Spoone v. Cowan*, Civil No. 57584, Circuit court of the First Circuit (ROA, Vol. I, pp. 1-27) and in criminal proceedings in which he was a defendant in an assault charge (ROA, Vol I, p. 154).

Appellant's alleged cause of action arises out of his belief that he was unlawfully held to be in contempt of court for violating a permanent injunction in *Spoone v. Cowan*. In *Spoone v. Cowan*, a permanent injunction was entered upon a stipulation voluntarily executed by Appellant which required that he not contact his former girlfriend Jeanette Spoone (ROA, Vol I, p. 98). Appellant violated the injunction and was given a six months suspended sentence by Judge Harold Y. Shintaku (ROA, Vol. I, p. 101). On De-

cember 11, 1979 a hearing was held before Judge Shintaku upon a motion seeking an order imposing sanctions upon Appellant for civil contempt of court. (ROA Vol. I, p. 145). At the hearing Appellant requested that the court impose a six months sentence upon him (ROA, Vol I, p. 145). Accordingly, mittimus was issued on December 11, 1979 (ROA, Vol. I, p. 147) and Appellant was sent to prison as requested. On December 21, 1979, Judge Shintaku visited Appellant at prison and informed him that he could be released upon the condition that he agree not to contact Jeanette Spoone and agree to be psychiatrically examined (ROA, Vol. I, pp. 109-110). Appellant rejected the terms for his release and thus remained in prison.

Appellant's other brush with the law involved a charge of assault in the third degree. It is during these proceedings that Appellee Lawrence A. Goya became involved as a court appointed deputy public defender to represent Appellant. Appellant was initially found guilty of the charge but moved for a trial *de novo* on the basis that he was not notified of his right to a trial by jury. A new trial was granted but Appellant successfully moved for a dismissal on the ground that he was not accorded a speedy trial (ROA, Vol.I, pp. 221-224).

Appellant's complaint therefore, alleges that Appellees conspired to have him unlawfully imprisoned and thus caused him shock, emotional distress, anxiety and pain and suffering.

The Circuit Court dismissed Appellant's complaint and granted Appellees' Motion To Dismiss Complaint or Alternatively For Summary Judgment (ROA, Vol III, pp. 4-5). The Circuit court concluded that: 1) Appellant's cause of action was barred by the applicable statute of limitations and the doctrine of collateral estoppel; 2) Appellees Harold Y. Shintaku, Arnold B. Golden, M.D., and Lawrence A. Goya are immune under the doctrines of judicial and quasi judicial immunity, 3) Appellant's failure to properly serve

his complaint upon Appellee Lawrence A. Goya in a timely manner warranted dismissal of Appellant's complaint, and 4) Appellee State of Hawaii is immune from suit under the doctrine of sovereign immunity.

From the order of the Circuit Court, Appellant filed this appeal.

VI. ARGUMENT

A. The Circuit Court Correctly Granted Appellees' Motion To Dismiss Complaint or Alternatively For Summary Judgment.

A Motion to dismiss is proper when a complaint fails to state a claim upon which relief can be granted under Rule 12(b) (6), Hawaii Rules of Civil Procedure. Summary judgment is properly granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law under Rule 56(c), Hawaii Rules of Civil Procedure. Under either standard, it is crystal clear that the circuit court properly granted Appellees' Motion.

1. The Circuit Court Correctly Concluded That Appellant's Action Is Barred By The Statute of Limitations And the Doctrine Of Collateral Estoppel.

The lower court concluded that Appellant's action is barred by the applicable statutes of limitations.

Section 657-7, Hawaii Revised Statutes, provided as follows:

§657-7 Damage to persons or property, Actions for the recovery of compensation for damage or injury to persons or property shall be instituted within two years after the cause of action accrued, and not after, except as provided in section 657-13.

As to Appellee State of Hawaii, the complaint fails to allege any action by the State except for being the em-

ployers of Shintaku, Golden and Goya. As such, section 662-15, Hawaii Revised Statutes, precludes any action against the State.

Section 662-15 provides, in relevant parts:

- (1) §662-15 Exceptions, This chapter shall not apply to: Any claim based upon an act or omission of an employee of the State, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state officer or employee, whether or not the discretion involved has been abused;

* * * *

- (4) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

Even assuming a cause of action exists, section 662-4, Hawaii Revised Statutes, requires an action in tort to be brought within two years after the claim occurs. Section 662-4, provides:

§662-4 *Statute of limitations.* A tort claim against the State shall be foreverbarred unless action is begun within two years after the claim accrues, except in the case of a medical tort claim when the limitation of action provisions set forth in section 657-7.3 shall apply.

It is clear that the actions attributable to Appellee Goya about which Appellant complains, occurred on April 7, 1980, when Appellee Goya drafted an order transferring Appellant to Kaneohe State Hospital (ROA, Vol. I. P. 18), and on April 8, 1980, when Appellee Goya filed a Motion

for Mental Examination of Defendant (ROA, Vol I, p. 19). Appellee could not have participated in any of the alleged actions occurring prior to February 5, 1980 since he was not involved in the civil contempt proceedings and had no association with Appellant during that period of time. Appellee Goya drafted the order transferring Appellant to Kaneohe State Hospital, presumably at the request of Judge Shintaku after Appellant had informed the judge that he was willing to be psychiatrically examined. (ROA, Vol. I, p. 127). Appellant had two years from April 8, 1980 to file an action against Appellee Goya.

As to the other Appellees, it was similarly appropriate to dismiss the action since the incidents about which Appellant complained as to them occurred more than two years before the date Appellant filed his suit. The incidents involving Appellees Shintaku and Golden upon which Appellant's tort action is premised took place between July 23, 1979 when he first appeared in Judge Shintaku's court and February 5, 1980, the date the mittimus for the civil contempt of court was issued. Accordingly, as to Appellees Shintaku and Golden, the two year statute of limitation in section 657-7, Hawaii Revised Statutes applies and the action being filed on June 7, 1982, is untimely.

Accordingly, the lower court properly concluded the Appellant's action is barred by the statute of limitations.¹ The statute of limitations is not tolled as to any of the appellees because the tolling provision in section 657-13 is limited to imprisonment for a criminal offense and Appellant was held to be in *civil* contempt and incarcerated therefor.

Section 657-13, Hawaii Revised Statutes, provides, as follows:

¹ The 2 year statute of limitations would also apply to actions brought under 42 USC§1983. *Wilson v. Garcia*, 53 USLW 4481 (1985).

§657-13 *Infancy, insanity, imprisonment.* If any person entitled to bring any action specified in this part (excepting actions against the sheriff, chief of police, or other officers) is, at the time the cause of action accrued, either:

- (1) Within the age of eighteen years; or,
- (2) Insane; or,
- (3) Imprisoned on a *criminal charge*, or in execution under the sentence of a criminal court for a term less than his natural life; such persons shall be at liberty to bring such actions within the respective times limited in this part, after the disability is removed or at any time while the disability exists [Emphasis added.]

Appellant does not have six years to file his action as there is not evidence of a fraudulent concealment of a cause of action.

Furthermore, Appellant held the key to his release from prison but chose instead, of his own volition, to continue his imprisonment by refusing to seek psychiatric treatment, refusing to agree not to contact Jeanette Spooner, and requesting that the sentence be imposed upon him in order to prove his love for Jeanette Spooner. (ROA, Vol. I, pp. 6, 107, 172).

Since Appellant chose to remain in prison upon the imposition of the sanction, even after Judge Shintaku has offered to release him (ROA, Vol. I, pp. 109-110), he cannot complain of any acts of the Appellees after the issuance of the mittimus on February 5, 1980.

[MATERIAL DELETED IN PRINTING]

2. The Circuit Court Correctly Concluded That Judges, Court Appointed Psychiatrists, and Court Appointed Public Defenders Enjoy Judicial And Quasi-Judicial Immunity From Suit.

Appellee Harold Y. Shintaku, at all time relevant to Appellant's complaint was a judge of the circuit Court of the First Circuit, State of Hawaii. Appellee Arnold B. Golden, at all times relevant to Appellant's complaint was court-appointed psychiatrist appointed to evaluate Appellant. Appellee Lawrence A. Goya, at all times relevant to Appellant's complaint, was a public defender and appellant's court-appointed attorney for purposes of defending him in his criminal assault trial in the District Court of The First Circuit. As such, the Circuit Court concluded that each of them is immune from liability.

a. JUDGES

Judges are absolutely immune from civil liability for acts done in their official capacities, unless committed in the clear absence of all jurisdiction. *Nixon v. Fitzgerald*, 457 U.S. 731, 102 S. Ct. 2690, 73 L. Ed. 2d 349 (1982), *Harlow v. Fetzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed.2d 396 (1982); *Stump v. Sparkman*, 435 U.S. 349 98 S. Ct. 1213, 55 L. Ed 2d 331 (1978); *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L. Ed. 2d 288 (1967); *Siebel v. Kemble*, 63 Haw.516, 631 P. 2d 173 (1981); *State v. Taylor*, 49 Haw. 624, 425 P. 2d 1014 (1967); *Gomes v. Whitney*, 21 Haw. 539 (1913). This theory of absolute immunity grants judges protection from any damage action in the performance of their duties, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 20 L. Ed. 646 (1872); *Siebel v. Kemble*, *supra*.

In *Nixon v. Fitzgerald*, the Supreme Court stated at p. 745 that:

.... The decision in *Pierson v. Ray*, 386 U.S. 547, 18 L. Ed. 2d 288 (1967), involving a 1983 suit against a state judge, recognized the continued validity of the absolute immunity of judges for acts within the judicial role. This was a doctrine "not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judge should be at liberty to exercise their functions with independence and without fear or consequences." *Id.* at 554, quoting, *Scott v. Stansfield*, L.R. 3 Ex. 220, 223 (1868).

In *Mirin v. The Justices of the Supreme Court of Nevada, et al.*, 415 F. Supp. 1178 (D. Nevada 1976), involving an action against the justices of the Nevada Supreme Court, among others, the court held, *inter alia*, that judges were immune with respect to a request for injunctive relief relating to the performance of judicial duties.

The court stated in relevant part:

It is to be noted that, while *Bradley* involved a suit for damages, judicial immunity was held by the Supreme Court to apply to *all* civil actions. So also did the Supreme Court hold in *Pierson v. Ray*, 386 U.S. 547, 554, 87 S. Ct. 1213, 1218, 18 L. Ed. 2d 288, 294 (1967), again involving a suit for damages but supporting judicial immunity against *all* civil actions, including actions brought under 42 U.S.C. 1983. (Civil Rights actions; whether "an action at law [damages], suit in equity [injunctive or declaratory relief.], or other proper proceedings for redress")

It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges

would contribute not a principled and fearless decision making but to intimidation.

The basis for extending such immunity to judges has been enumerated in *Butz v. Economou*, 438 U.S. 478, 512, 98 S. Ct. 2894, 5 L. Ed. 2d 895 (1978).

The cluster of immunities protecting the various participants in Judge-supervised trials stems from the characteristics of the judicial process rather than its location. As the Bradley Court suggested, 13 Wall at 348-349, 20 L. Ed. 646, controversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus. See *Pierson v. Ray*, 386 U.S. at 554, 18 L. Ed. 2d 288, 87 S. Ct. 1213. Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation.

At the same time, the safeguards built into the judicial process tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct. The insulation of the judge from political influence, the importance of precedent in resolving controversies, the adversary nature of the process, and the correctability of error on appeal are just a few of the many checks on malicious action by judges. Advocates are restrained not only by their professional obligations, but by the knowledge that their assertions will be contested by their adversaries in open court. Jurors are carefully screened to remove all possibility of bias. Witnesses are, of course, subject to the rigors of cross-examination and the penalty of perjury. Because these features of the judicial process tend to enhance the reliability of information and the impartiality of the decision-making process, there is

less pressing need for individual suits to correct constitutional error. *id* at 512.

Thus, because the absolute immunity of judges from suit is well settled, relying upon that doctrine, the circuit court properly dismissed Appellant's action against Appellee Harold Y. Shintaku.

b. COURT APPOINTED PSYCHIATRISTS

Appellee Arnold B. Golden M.D., examined Appellant pursuant to the December 18, 1979 order issued by Judge Shintaku in *Spoone v. Cowan*, Civil No. 57584, the order provided, in pertinent part:

(4) That Defendant Donald D. Cowan submit himself to the custody of the Department of Social Services and Housing for psychiatric examination during the term of imprisonment. (ROA, Vol. I, pp. 81-82).

Appellee Golden's actions, therefore, were all done pursuant to carrying out the official directives of a court. As such, Appellee is absolutely immune from Appellant's suit.

In *Seibel v. Kemblel*, 63 Haw. 516, 631 P. 2d 173 (1981), this Court held that court-appointed psychiatrists are protected from suit by the absolute judicial immunity extended to judges and other judicial officials through the order of a court who appoints them and requires them to make an examination and aid the court in its decisionmaking.

Similarly, in *Burkes v. Callion*, 433 F. 2d 318 (9th Cir. 1970), it was held that courtappointed psychiatrists who prepared and submitted medical reports to state court were immune from liability in an action brought under 42 USC § 1983 which otherwise allows person to bring a civil action for deprivation of rights on the ground that the psychiatrists had made false statements of fact and omitted material facts in their reports to the state court in a criminal case. See also *Franklin v. State of Oregon, State Welfare Divison*, 662 F. 2d 1337 (9th Cir. 1981).

The Court in *Burkes*, in upholding a lower court's granting of absolute immunity for a probation officer and court-appointed psychiatrist stated:

We hold that the court-appointed psychiatrist who prepared and submitted medical reports to the state court are also immune from liability for damages under Act.²

The function of the examining psychiatrists in this case falls within the scope of "quasi-judicial immunity," defined by this court in *Robinchaud v. Ronan*, 351 F. 2d 533, 536 (9th Cir. 1965), to extend to acts committed "in the performance of an integral part of the judicial process." *Burkes*, *supra* 433 F. 2d at 319.

Kurzawa v. Mueller, 732 F.2d 1456, (6th Cir. 1984), and *Hulsman v. Hemmeter Dev. Corp.*, 65 Haw. 58, 647 P. 2d 713 (1982) are consistent with this position. In *Hulsman*, this Court, citing with approval the rationale in *Seibel*, stated:

The rationale underlying our decision in *Seibel v. Kemble*, *supra*, is equally applicable in the instant case. A probation officer in the preparation investigation and presentation of a pre-sentence report provides an important service to the court. As such in this capacity, a probation officer is entitled to absolute judicial immunity in the performance of his duties. *Id.* at p. 64.

Appellee Golden was also an expert witness and is entitled to witness immunity arising from his testimony in judicial proceedings.

In *Myers v. Bull*, 599 F. 2d 863 (8th Cir. 1979) the issue of witness immunity from civil suits arising from testimony in judicial proceedings was addressed. The court, in up-

² 42 USC §1983.

holding a lower court's holding that a witness should be immune from civil rights suits alleging perjurious testimony noted:

Without engaging in an unduly detailed discussion of the history of the common law rule granting absolute immunity to witnesses, we agree that the majority position is correct and that witnesses should be immune from civil rights suits alleging perjurious testimony. In [sic] *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976), the Supreme Court held prosecutors immune from civil rights suits based on acts taken in the course of their duties. In so holding, the stressed the need for full disclosure of relevant evidence to the jury and noted that a prosecutor might be reluctant to call witnesses if he would be subject to civil suit based on the allegation that he knew or should have known that they were testifying falsely. *Id.*, at 426, 96 S.Ct. 984. A similar rationale would apply to witnesses who might be reluctant to give their version of the case if faced with the possibility of civil suit if their testimony is disbelieved by the trier of fact. *Id.* at 866.

The court, therein, recognized the rule of witness immunity as being co-extensive with the immunity of other participants at trial, i.e., judges and prosecutors. Similarly, *Briscoe v. LaHue*, 460 U.S. 325, 75 L. Ed 2d 96, 103 S. Ct. 1108 (1983) and *O'Connor v. State of Nevada*, 686 F. 2d 749 (9th Cir., 1982) confirm such a conclusion.

Furthermore, in *Slotnick v. Garfinkle*, 632 F. 2d 163 (1st Cir., 1980), the court, citing *Fowler v. Alexander*, 478 F. 2d 694, 696 (4th Cir., 1973) which held that a sheriff and jailer confining a plaintiff in execution of a court order are absolutely immune from suit, held that judicial immunity extends as well to those who carry out the orders of judges. Since Appellee Golden was merely carrying out an order of the court, he cannot be sued for his actions.

Appellant's Opening Brief asserts the Appellee Golden had a duty to provide a copy of his psychiatric evaluation of Appellant to him. (Appellant's Opening Brief, pp. 21-22.) In support of this assertion, Appellant cites Rule 35, Hawaii Rules of Civil Procedure. Appellant's assertion of liability against Appellee Golden is premised upon this duty and Dr. Golden's alleged breach of that duty. Appellees assert, however, that Appellant's reliance on Rule 35 is misplaced. Rule 35(b)(1) provides:

(b) Report of examining Physician.

(1) If requested by the party against whom an order is made under Rule 35 (a) or the person examined, *the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination, shall be entitled upon request to receive from the party against whom the order is made a like report of any examination previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician fails or refuses to make a report the court may exclude his testimony if offered at the trial. [Emphasis added.]*

Clearly, under Rule 35 (b)(1), it is the party causing the examination to be made who is required to provide a copy of the examination to Appellant. Appellee Golden, therefore, fulfilled his duty by examining Appellant and submitting his report to the court.

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VII. CONCLUSION

For the reasons expressed herein, Defendants-Appellees, Harold Y. Shintaku, Arnold B Golden, Lawrence A. Goya and the State of Hawaii respectfully request that this Honorable Court affirm the decision of the Circuit Court below.

DATED: Honolulu, Hawaii, August 12, 1985.

STATE OF HAWAII

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/s/BY RUSSELL A. SUZUKI
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Appellees, Harold Y. Shintaku, Arnold
B. Golden, Lawrence A. Goya
and State of Hawaii

APPENDIX L

No. 10256

**IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII**

DONALD D. COWAN,

CIVIL NO. 71638

Plaintiff-Appellant,

vs

**STATE OF HAWAII, CITY AND
COUNTY OF HONOLULU,
HAROLD Y. SHINTAKU, SANDRA
ALEXANDER, ARNOLD B.
GOLDEN and LAWRENCE. GOYA,**

Defendants-Appellees

and

KEN T. KUNYUKI,

**APPEAL FROM THE CON-
CLUSIONS OF LAW AND OR-
DER GRANTING MOTION TO
DISMISS COMPLAINT OR
ALTERNATIVELY FOR SUM-
MARY JUDGMENT AS
AGAINST DEFENDANTS
STATE OF HAWAII, HAR-
OLD Y. SHINTAKU, ARNOLD
B. GOLDEN AND LAW-
RENCE A. GOYA, FILED
JUNE 14, 1983; AND ORDER
GRANTING MOTION TO DIS-
MISS COMPLAINT AGAINST
SANDRA ALEXANDER AND
CITY AND COUNTY OF HON-
OLULU, FILED JULY 21, 1983**

FIRST CIRCUIT COURT

**HONORABLE JAMES H.
WAKATSUKI, HONORABLE
PHILIP T. CHUN, JUDGES**

**MOTION FOR RECONSIDERATION
MEMORANDUM IN SUPPORT OF MOTION FOR
RECONSIDERATION [and] CERTIFICATE OF GOOD
FAITH and CERTIFICATE OF SERVICE**

FILED

1986 OCT 1 PM 3:51

Darrell N. Phillips

**CLERK INTERMEDIATE
COURT OF APPEALS**

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MOTION FOR RECONSIDERATION

Defendants-Appellees HAROLD SHINTAKU and ARNOLD B. GOLDEN ["Appellees"], by their counsel below, respectfully move this Court to reconsider its opinion filed on September 22, insofar as it "vacate[s] the lower court's June 14, 1983 and July 21, 1983 orders of dismissal with respect to the counts, causes of action, and defendants stated in section III" of the opinion. *Cowan v. State of Hawaii et al.*, No. 10256, slip op. at 44-45 (Hawaii App. Sept. 22, 1986) [hereinafter "Slip op."]. On reconsideration, Appellees respectfully request the Court to affirm the judgment below as to them in all respects.

This motion is made pursuant to Rule 40 of the Hawaii Rules of Appellate Procedure and is based upon the points of law and fact which this Court has overlooked or misapprehended, including, but not limited to the following:

(1) Although the Court correctly recognizes that the absolute federal immunity rules elaborated in *Ashelman v. Pope*, 793 F.2d 1072 (9th Cir. 1986) (en banc), and only those rules, must be applied to Counts XV and XVI, see Slip op. at 37, 40 see *Ferri v. Ackerman*, 444 U.S. 193,

198 n.13 (1979); *Makanui v. Department of Education*, 721 P.2d 165, 172 (Hawaii App. 1986), the Court appears to have overlooked the general authority of a state circuit court to have determined at the threshold whether the plaintiff was competent to exercise his asserted rights to run his criminal defense, *see Faretta v. California*, 422 U.S. 806 (1975). *See* Hawaii Rev. Stat. § 603-21.5 (1976); *cf.* Hawaii Rev. Stat. ch. 560 (1976 & Supp. 1984). Given this statutory authority, such action as is encompassed by Counts XV and XVI, even if true, would not be "in the 'clear absence of all jurisdiction'" as that term is used in *Stump v. Sparkman*, 435 U.S. 349, 360 (1978). *Sparkman* immunity should thus apply to Judge Shinktak (and to defendant Golden under the reasoning of *Sharma v. Stevas*, 790 F.2d 1498 (9th Cir. 1986), and the federal immunity cases cited in *Siebel v. Kemble*, 63 Hawaii 516, 631 P.2d 173 (1981)).

(2) In failing to apply the two-year statute of limitations for "damage or injury to persons or property," Hawaii Rev. Stat. § 657-7 (1976), the Court has overlooked the very substantial precedent requiring that the ruling in *Wilson v. Garcia*, 105 S. Ct. 1938 (1985), be given retroactive effect. *See Mulligan v. Hazard*, 106 S. Ct. 2902, 2903 (White, J., dissenting from the denial of certiorari) (citing cases). Because *Wilson* should be applied retroactively, the Court should eschew reliance on *Lai v. City & County of Honolulu*, 749 F.2d 588 (9th Cir. 1984), *cited*, Slip op. 36, and dismiss Counts XV and XVI as time-barred. *Id.* at 31 (time of events).

This motion is also based upon the briefs filed and argument held herein, together with the Memorandum in Support of Motion for Reconsideration attached hereto, as well as the records and files in this action.

DATED: Honolulu, Hawaii, October 1, 1986.

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No. 10256

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

DONALD D. COWAN,

CIVIL NO. 71638

Plaintiff-Appellant,

vs.

STATE OF HAWAII, CITY AND
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HAROLD Y. SHINTAKU, SANDRA
ALEXANDER, ARNOLD B.
GOLDEN and LAWRENCE A.
GOYA,

Defendants-Appellees,

and

KEN T. KUNIYUKI,

Defendant.

APPEAL FROM THE
CONCLUSIONS OF LAW
AND ORDER GRANDING
MOTION TO DISMISS
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NATIVELY FOR SUM-
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STATE OF HAWAII, HAR-
OLD Y. SHINTAKU, AR-
NOLD B. GOLDEN AND
LAWRENCE A. GOYA,
FILED JUNE 14, 1983;
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MOTION TO DISMISS
COMPLAINT AGAINST
SANDRA ALEXANDER
AND CITY AND COUNTY
OF HONOLULU, FILED
JULY 21, 1983

FIRST CIRCUIT COURT

HONORABLE JAMES H.
WAKATSUKI, HONORA-
BLE PHILIP T. CHUN,
JUDGES

MEMORANDUM IN SUPPORT OF MOTION FOR
RECONSIDERATION
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ARGUMENT

The Court's memorandum opinion filed on September 22, 1986, after substantial analysis "vacate[s] the lower court's June 14, 1983 and July 21, 1983 orders of dismissal with respect to the counts, causes of action, and defendants stated in section III" of the opinion. *Cowan v. State of Hawaii et al.*, No. 10256, slip op. at 44-45 (Hawaii App. Sept. 22, 1986) [hereinafter "Slip op."] The Attorney General respectfully submits that reconsideration should be granted as to these two counts and with respect to defendants Shintaku and Golden.

I. The Allegations of Counts XV and XVI Do Not Describe Conduct that Was Clearly Beyond All Jurisdiction of the Circuit Court Judge.

The Court's opinion correctly recognizes that the absolute federal immunity rules elaborated in *Ashelman v. Pope*, 793 F.2d 1072 (9th Cir. 1986) (en banc), and only those rules, must be applied to Counts XV and XVI, see Slip op. at 37, 40, see *Ferri v. Ackerman*, 444 U.S. 193, 198 n.13 (1979); *Makanui v. Department of Education*, 721 P.2d 165, 172 (Hawaii App. 1986). Appellees have therefore assumed that the Court, in refusing to grant Judge Shintaku and Dr. Golden immunity on the basis of the

allegations of Counts XV and XVI, has ruled that immunity cannot apply in such an instance under the rule from *Stump v. Sparkman*, 435 U.S. 349 (1978). The Court appears to have overlooked the Circuit Court's general authority to have determined at the threshold whether the plaintiff was competent to exercise his asserted rights to run his criminal defense, see *Faretta v. California*, 422 U.S. 806 (1975). See Hawaii Rev. St. § 603-21.5 (1976); cf. Hawaii Rev. Stat. ch. 560 (1976 & Supp. 1984). Such action as is encompassed by Counts XV and XVI, even if true, would not be "in the 'clear absence of all jurisdiction'" as that term is used in *Stump v. Sparkman*, 435 U.S. 349, 360 (1978). Even if such alleged conduct constituted "grave procedural error," it would not oust the Judge's right to immunity. *Ashelman*, 793 F.2d at 1077. *Sparkman* immunity should thus apply to Judge Shintaku (and to Golden under *Sharma v. Stevas*, 790 F.2d 1486 (9th Cir. 1986) and the federal immunity cases cited in *Siebel v. Kemble*, 63 Hawaii 516, 631 P.2d 173 (1981)). The motion should thus be granted and the judgment as to Counts XV and XVI affirmed.

II. The Court Overlooked the Necessity of Applying the Two-Year Statute of Limitations.

In refusing to dismiss Counts XV and XVI on statute of limitations grounds, the Court appears to have relied on *Lai v. City and County*, 749 F.2d 588 (9th Cir. 1984), cited, Slip op. 36. *Wilson v. Garcia*, 105 S. Ct. 1938 (1985), however, requires a court in a § 1983 case to apply the state's personal injury statute of limitations. Here, that limitations period is two years. Hawaii Rev. Stat. § 657-7 (1976). For the reasons stated in the cases holding *Garcia* to apply retroactively, Appellees submit the Court should grant reconsideration as to the statute or limitations rulings with respect to Counts XV and XVI. See, e.g., *Mulligan v. Hazard*, 77 F.2d 340 (6th Cir. 1985), cert. denied, 106 S. Ct. 2902 (1986); *Gates v. Spinks*, 771 F.2d

916 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 1378 (1986); *Jones v. Preuit & Maudlin*, 763 F.2d 1250 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 893 (1986).

CONCLUSION

For the foregoing reasons, as well as those stated in the briefs on appeal, the motion for reconsideration should be granted and judgment for defendants affirmed in all respects.

DATED: Honolulu, Hawaii, October 1, 1986.

CORINNE K. A. WATANABE
Attorney General

/s/ Steven S. Michaels
STEVEN S. MICHAELS
RUSSELL A. SUZUKI
Deputy Attorneys General

Attorneys for Defendants-
Appellees State, Shintaku,
Golden, and Goya

CERTIFICATE OF GOOD FAITH

I hereby certify, as one of the attorneys for Defendants-Appellees Shintaku and Golden, that this Motion for Reconsideration is presented in good faith and not for purposes of delay.

DATED: Honolulu, Hawaii, October 1, 1986.

CORINNE K. A. WATANABE
Attorney General

/s/ Steven S. Michaels
STEVEN S. MICHAELS
RUSSELL A. SUZUKI
Deputy Attorneys General

Attorneys for Defendants-
Appellees State, Shintaku,
Golden, and Goya

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing were duly served upon the following by placing the same into the United States mail, first class postage prepaid, addressed as follows, on October 1, 1986:

DONALD D. COWAN
Armed Forces YMCA
250 South Hotel Street
Room 46D
Honolulu, Hawaii 96813

Dated: Honolulu, Hawaii, October 1, 1986.

/s/ Steven S. Michaels
STEVEN S. MICHAELS
Deputy Attorney General

APPENDIX M

NO. 10256

IN THE SUPREME COURT OF THE STATE OF HAWAII

DONALD D. COWAN,

CIVIL NO. 71638

Plaintiff-Appellant,

vs.

STATE OF HAWAII, CITY AND
COUNTY OF HONOLULU,
HAROLD Y. SHINTAKU, SANDRA
ALEXANDER, ARNOLD B.
GOLDEN and LAWRENCE A.
GOYA,

Defendants-Appellees,

and

KEN T. KUNIYUKI,

Defendant.

APPEAL FROM THE CON-
CLUSIONS OF LAW AND
ORDER GRANTING MOTION
TO DISMISS COMPLAINT OR
ALTERNATIVELY FOR
SUMMARY JUDGMENT AS
AGAINST DEFENDANTS
STATE OF HAWAII, HAR-
OLD Y. SHINTAKU, ARNOLD
B. GOLDEN AND LAW-
RENCE, A GOYA, FILED
JUNE 14, 1983; AND ORDER
GRANTING MOTION TO DIS-
MISS COMPLAINT AGAINST
SANDRA ALEXANDER AND
CITY AND COUNTY OF HON-
OLULU, FILED JULY 21,
1983

FIRST CIRCUIT COURT

HONORABLE JAMES H.
WAKATSUKI, HONORABLE
PHILIP T. CHUN, JUDGES.

FILED

1986 OCT 20 PM 3:54

EUGENE L. SABADO
CLERK SUPREME COURT

CORINNE K. A. WATANABE
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Appellees State, Shintaku,
Golden, and Goya

APPLICATION FOR A WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED.

1. Whether the immunity to which judges and those performing quasi-judicial functions are entitled when sued in their individual capacities under the federal civil rights statutes, *e.g.*, 42 U.S.C. § 1983, or substantive constitutional principles, bar claims here based on allegations that a Hawaii circuit court judge and court-appointed officials interfered with a criminal defendant's claimed rights not to assert a mental irresponsibility defense and to thus avoid a psychiatric examination required by state law when that defense is raised?

2. Whether, with respect to a claim pursuant to the federal civil rights laws, *e.g.*, 42 U.S.C. § 1983, filed before *Lai v. City and County*, 749 F. 2d 588 (9th Cir. 1984), and the overruling decision in *Wilson v. Garcia*, 105 S. Ct. 1379 (1985), the Hawaii courts must follow *Garcia* and apply the personal injury limitations period of two years, which is set forth at Hawaii Rev. Stat. § 657-7 (1976)?

II. PROCEEDINGS AND STATEMENT OF THE CASE.

A. Appellate Jurisdiction and the Decisions Below.

The decision of the Intermediate Court of Appeals, *Cowan v. State*. No. 10256 (Hawaii App. Sept. 22, 1986) ["Slip op."], is reprinted in Appendix A. Defendants-appellees Harold Y. Shintaku, at relevant times a sitting judge of the Circuit Court for the First Circuit, State of Hawaii ["Judge Shintaku"] and Arnold B. Golden, at relevant times a court-appointed psychiatrist ["Dr. Golden"] [collectively, "Petitioners"], who were prejudiced by the decision of the Intermediate Court of Appeals, filed a timely motion for reconsideration under Rule 40, Hawaii R. App. P., on October 1, 1986. On October 8, 1986, Petitioners' motion was denied by a memorandum order ["Reconsideration Order"], which is reprinted in Appendix B. That same day, the Intermediate Court of Appeals de-

nied a motion for reconsideration filed by plaintiff Donald D. Cowan ["Cowan"]. The memorandum order denying Cowan's motion is reprinted in Appendix C. A further memorandum order amending the decision of September 22, 1986, was also issued on October 8, 1986, and is reprinted in Appendix D. Under Rules 26 (a) and 31 (e) (1), Hawaii R. App. P., the time for filing this Application extends to and includes October 20, 1986.

B. Statement of the Case.

Insofar as is relevant to this Application, the complaint charges that Judge Shintaku and Dr. Golden, along with others, conspired to deprive Cowen "of his right to counsel [and] right to assert a defense of his own choosing, and . . . illegally impose[d . . . a] 'guardian [in the guise of a public defender]'" upon Cowan in HPD Rept. M-00567, a criminal proceeding brought in the District Court for the District of Honolulu, State of Hawaii, in which Cowan was charged with committing assault in the third degree against one Jeannette Spoone. Complaint ¶¶ 49, 76, 84, 85, 1Record on Appeal ["R."] 13, 18, 19; *see* Slip op. at 11. In that proceeding, on April 8, 1980, Cowan's attorney, Deputy Public Defender Lawrence Goya, noticed Cowan's intent to invoke the defense of mental irresponsibility and a motion for mental examination of the defendant pursuant to Hawaii Rev. Stat. § 704-404 (Supp. 1979). Complaint ¶ 84, 1 R. 19; *see* Slip op. at 12. As a consequence of this motion, Cowan was allegedly subjected to an examination by three psychiatrists in about April or May 1980, *see* Slip op. at 13-14. Cowan alleges that Goya, by causing the examinations to go forward, disobeyed Cowan's desire to rely on the privilege to use force for the protection of property, Hawaii Rev. Stat. § 703-306 (1976). Complaint ¶ 84, 1 R. 19.

At the time the assault charges were lodged, Judge Shintaku was the presiding judge in a civil action by Spoone against Cowan to obtain redress from and to re-

strain acts of harassment committed by Cowan. *See* slip op. at 2-11 (recounting events in Civil No. 57584). On December 18, 1979, in that civil action, Judge Shintaku allegedly ordered Cowan found in contempt of court, imprisoned, and fined. In addition, Judge Shintaku allegedly ordered Cowan to undergo psychiatric examination while incarcerated. Slip op. 5. Dr. Golden supposedly conducted a psychiatric examination upon Cowan, and concluded on January 8, 1980, that Cowan was "delusional" with respect to his relationship with Ms. Spooone, and recommended that "a full sanity commission be empanelled[.]" *See* Slip op. at 6. The claim here appears to be that Petitioners somehow "conspired to have Cowan's attorney in the district court criminal case against Cowan rely on the defense of mental irresponsibility which Cowan alleges he did not want to rely on rather than on the defense of authorized use of force which Cowan alleges he wanted to rely on." Slip op. 3.

C. Proceedings Below.

The complaint in this action was filed on June 7, 1982, after the limitations period for personal injury claims had expired with respect to any claim accruing before June 7, 1980, Hawaii Rev. Stat. § 657-7 (1976). On January 13, 1983, Petitioners moved for dismissal on the basis of the statute of limitations, judicial and quasi-judicial immunity, and issue and claim preclusion. *See* Slip op. 17. Then Circuit Court Judge Wakatsuki granted the motion on June 14, 1983. *Id.* On appeal, the Intermediate Court of Appeals, while affirming dismissal of many other claims against Petitioners and others, vacated Judge Wakatsuki's orders concerning the foregoing claim against Petitioners (Counts XV and XVI), which the lower court characterized as a single, valid cause of action arising solely under 42 U.S.C. § 1983. Slip op. 31, 44.¹

¹ The lower court also rejected a preclusion defense on the basis that it was unperfected. *See* Slip op. at 16-17 & n.4.

On reconsideration, the Intermediate Court of Appeals rejected Petitioner's claim that vacation as to Counts XV and XVI was contrary to the absolute judicial immunity rule set forth in *Stump v. Sparkman*, 435 U.S. 349 (1978). The Intermediate Court of Appeals also rejected the reasoning of those federal courts of appeals that have given retroactive effect to the Supreme Court's decision in *Wilson v. Garcia* 105 S. Ct. 1938 (1985). See e.g., *Mulligan v. Hazard*, 777 F.2d 340 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 2902 (1986); *Gates v. Spinks*, 771 F. 2d 916 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 1378 (1986); *Jones v. Preuit & Maudlin*, 763 F.2d 1250 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 893 (1986); see also *Alkhazraji v. St. Francis College*, 784 F. 2d 505, 514 (3rd Cir.) (applying *Garcia* rule to claims filed before *Goodman v. Lukens Steel*, 777 F. 2d 113 (3rd Cir. 1985), but not cases filed after *Goodman* but before *Garcia*), *certiorari granted*, 55 U.S.L.W. 3231 (U.S. Oct. 6, 1986). In so doing the Intermediate Court of Appeals appeared to rely on the decision of the United States Court of Appeals for the Ninth Circuit in *Gibson v. United States*, 781 F. 2d 1334 (9th Cir.1986). See Reconsideration Order at 2.² The lower court found

² The decision cited by the Intermediate Court of Appeals in its Reconsideration Order, *United States v. Claiborne*, 781 F. 2d 1334 (th Cir. 1986), involves an appeal from the federal criminal trial of Judge Harry Claiborne of the District of Nevada, and does not concern any claim brought under 42 U.S.C. § 1983. The Intermediate Court of Appeals apparently intended to cite to *Gibson v. United States*, 781 F. 2d 1334 (9th Cir. 1986), which appears on the same page of Federal Reporter as a reported opinion from the *Claiborne* appeal. It should be noted as well that although the lower court suggests that Petitioners ignored the Ninth Circuit decision in *Gibson*, Reconsideration Order at 2, Petitioners did in their motion for reconsideration acknowledge that the *Garcia* problem was the subject of split amongst the federal circuits, and cited to Justice White's dissent from the denial of certiorari in *Mulligan v. Hazard* 106 S. Ct. 2902, 2903 (1986) (White, J., dissenting), *cited*, Motion for Reconsideration at 3, in which the decisions of the courts of appeals concerning retroactive application of *Garcia*, including the Ninth Circuit's decision in *Gibson*, are discussed.

Gibson “more p[er]suasive,” and followed the Ninth Circuit “since Hawaii is within the Ninth Circuit [.]” *Id.*

III. ARGUMENT.

Certiorari should be granted in this case to correct the Intermediate Court of Appeals’ unwarranted expansion of the right to counsel, misapplication of the federal doctrine of judicial and quasi-judicial immunity, and erroneous judgment regarding the principles governing retroactive application of the decisions by the Supreme Court of the United States on matters of federal law. In the alternative, given that *Garcia*’s retroactivity will be decided by the Supreme Court on review of *Al-Khazraji v. St. Francis College*, 784 F. 2d 505, 514 (3rd Cir.), *cert. granted sub nom. St. Francis College v. Al-Khazraji Majid*, No. 85-2169, 55 U.S.L.W. 3231 (U.S. Oct. 6, 1986); *see* 55 U.S.L.W. 3198 (questions presented), this Court should grant certiorari pending a disposition in No. 85-2169, in order to relieve the Supreme Court of the burden of correcting manifest error if *St. Francis College* is reversed.

A. In Allowing Counts XV and XVI to Stand, the Lower Court Unjustifiably Expanded the Federal Right to Counsel and Misapprehended the Circuit Court’s Jurisdiction.

1. The Lower Court Erred as a Matter of Substantive Law.

In both its Memorandum Opinion and Reconsideration Order, as well as other decisions, the Intermediate Court of Appeals has recognized that the standard for determining whether federal constitutional violations are stated by, or whether judicial immunity applies to, a § 1983 claim are matters of federal law on which the courts of Hawaii are bound by the precedents of the Supreme Court of the United States. Slip op. at 37,40; Reconsideration Order at 2; *cf. Ferri v. Ackerman*, 444 U.S. 198, n. 13 (1979); *Mak-anui v. Department of Education*, 721 P. 2d 165, 172 (Ha-

waii App. 1986). The lower court also recognized that for there to be a valid claim under § 1983 in this instance, it would be not for redress of a right to avoid psychiatric examination, *per se*, cf. *Ake v. Oklahoma*, 105 S. Ct. 1087 (1985), but rather for redress of a right to avoid such examination at the expense of forfeiting a mental irresponsibility defense. Reconsideration Order at 2. Such a right exists under the Constitution, if at all, solely as a consequence of the Sixth Amendment right of an accused to present "his defense." *Faretta v. California*, 422 U.S. 806, 821 (1976) (emphasis in original). In holding Cowan to have stated a valid *Faretta* claim, however, the Intermediate Court of Appeals overlooked the decision in *Jones v. Barnes*, 463 U.S. 745 (1983). In *Jones*, the Supreme Court reaffirmed that "[no] decision of this Court suggests that the indigent defendant has a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to press such points." *Id.* at 751. Under *Jones*, if a defendant accepts appointed counsel, he accepts, with certain exceptions, the benefits and detriments of that counsel's professional judgment. The right to forfeit a mental irresponsibility defense does not fall within the enumerated exceptions. *See id.* Because the lower court's decision is contrary to *Jones*, this Court should grant the writ and reverse the Intermediate Court of Appeals as to Counts XV and XVI.

2. The Lower Court Misapplied Federal Immunity Law.

Even if Counts XV and XVI stated a constitutional violation, the lower court committed a substantial error in refusing to grant Judge Shintaku absolute judicial immunity and in refusing to grant Dr. Golden absolute quasi-judicial immunity as a court-appointed psychiatrist. Assuming a constitutional violation was stated, the specific error committed by the lower court was its failure to distinguish between judicial acts that constitute "grave procedural er-

rors[.]” *Stump v. Sparkman*, 435 U.S. 349, 359 (1978), to which immunity applies, and acts “in the ‘clear absence of all jurisdiction[.]’” *id.* at 360, to which immunity does not apply.

In *Stump*, the Supreme Court reiterated the nature of this important distinction as follows:

[I]f a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune.

435 U.S. at 357 n. 7 (citing *Bradley v. Fisher*, 13 Wall. 335, 352 (1872)). As even Cowan conceded in his complaint, and as the law makes clear, the Circuit Court was not a court of limited jurisdiction like the probate court referred to in *Stump*. See Complaint ¶ 80, 1 R. 18. Rather, Judge Shintaku had explicit jurisdiction under Chapter 560, Hawaii Rev. Stat., to appoint Goya as Cowan’s legal guardian, as well as general jurisdiction under Hawaii Rev. Stat. § 603.21.5 (1976) to have a determination made, at the threshold, whether Cowan was competent to exercise his *Faretta* rights. Judge Shintaku, as a state circuit judge, thus plainly had subject matter jurisdiction to inflict the sort of injury of which Cowan complains in Counts XV and XVI. Thus, as Petitioners argued below, such action as is encompassed by Counts XV and XVI, even if true, would not be in the “clear absence of all jurisdiction.” “Where not clearly lacking subject matter jurisdiction, a judge is entitled to immunity even if there was no personal jurisdiction over the complaining party.” *Ashelman v. Pope*, 793 F. 2d 1072, 1076 (9th Cir. 1986) (en banc). At most, the allegations of Counts XV and XVI, if true, would give rise to a conclusion that Judge Shintaku lacked personal

jurisdiction to affect Cowan's rights in the manner he allegedly did. This is not enough to escape absolute immunity. Nor is it relevant that Cowan has alleged a conspiracy. See *Ashelman*, 793 F. 2d at 1078. The lower court thus erred in refusing to grant Judge Shintaku immunity.

The lower court equally erred in refusing to grant Dr. Golden immunity. No allegation is made that Dr. Golden was ever acting at any time other than at the behest of the circuit court judge, and, under this Court's own understanding of federal immunity for employees of the judiciary, see *Seibel v. Kemble*, 63 Hawaii 516, 631 P. 2d 173 (1981) (and federal decisions cited therein), Dr. Golden was entitled dismissal. See also *Sharma v. Stevas*, 790 F. 2d 1486 (9th Cir. 1986).

Because the lower court committed fundamental error in vacating dismissal on the basis of absolute judicial and quasi-judicial immunity, certiorari should issue and the decision below, insofar as it prejudices Petitioners, should be reversed.

B. The Lower Court Erred in Refusing to Give Garcia Retroactive Effect.

The Intermediate Court of Appeals also erred in following two decisions of the United States Court of Appeals for the Ninth Circuit. The first, *Lai v. City and County*, 749 F. 2d 588 (9th Cir. 1984), *overruled*, *Wilson v. Garcia*, 105 S. Ct. 1938 (1985), held that "the applicable limitations statute for section 1983 actions arising in Hawaii is H.R.S. § 657-1 (4)." 749 F. 2d at 590. The second, *Gibson v. United States*, 781 F. 2d 1334 (9th Cir. 1986), holds that "*Wilson* should not be retroactively applied to oust claims that were timely when filed." *Id.* at 1340. By following these decisions, the Intermediate Court of Appeals lengthened the limitations period from the two-years mandated by *Garcia*, and which had expired by the time the instant

complaint was filed, to six years. Reconsideration Order at 1.

It should be stressed at the outset that not even *Gibson's* holding supports the refusal to apply the two year limitations period, for, until the *Lai* decision, which was handed down *after* the instant action was filed and dismissed at the trial level, there was no "settled circuit authority [,]" *Gibson*, 781 F. 2d at 1339, much less settled authority binding in the courts of Hawaii, on which Cowan could have relied. Under the Ninth Circuit's own analysis, the decision of the Intermediate Court of Appeals embodies a manifestly erroneous application of the principles of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), *quoted*, *Gibson*, 781 F. 2d at 1339. Even the decision of the United States Court of Appeals for the Third Circuit in *Al-Khazraji v. St. Francis College*, 784 F. 2d 505, 514 (3rd Cir.), *cert. granted sub nom. St. Francis College v. Al-Khazraji Majid*, No. 85-2169, 55 U.S.L.W. 3231 (U.S. Oct. 6, 1986), recognized that *Garcia* should apply to claimants who could not have placed any reasonable reliance in specific circuit law establishing a particular limitations period for § 1983 actions. *See* 781 F. 2d at 514 (refusing to apply *Garcia* only "as to those persons whose causes of action arose after *Goodman*").

Moreover, as Petitioners believe the Supreme Court will find upon review of the *St. Francis College* decision, any refusal to apply *Garcia* retroactively is error under the principles of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). As the Supreme Court reaffirmed as late as this past Term, the Court's decisions have always interpreted § 1983 liability "against the background of tort [law.]" *Malley v. Briggs* 106 S. Ct. 1092, 1098 n.7 (1986) (quoting *Monroe v. Pape*, 365 U.S. 167, 187 (1961)). The Supreme Court has made equally clear that it was Congress's intent that the limitations period applicable to § 1983 claims be "borrowed" from those applicable to an "analogous [state-law] cause of action." *Board of Regents v. Tomanio*, 446 U.S.

478, 483-84 (1980). The holding in *Garcia* that the proper limitations to be borrowed in § 1983 claims were those applicable to personal injury claims in state court (here Hawaii Rev. Stat. § 657-7 (1976)), did not "establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil*, 404 U.S. at 106. Nor does retroactive application frustrate the *Garcia* rule. See *St. Francis College*, 784 F. 2d at 513. Nor, in light of the unreasonableness of reliance on a contra-*Garcia* rule, is retroactive application of *Garcia* in any sense "inequitable." *Chevron Oil*, 404 U.S. at 107; see *St. Francis College*, 784 F. 2d at 513-14 (noting that "this factor overlaps with the first *Chevron* factor"). Accordingly, the Intermediate Court of Appeals' decision not to give *Garcia* retroactive effect was error, and should be reversed.

Should the Court disagree with this analysis, and the other arguments presented herein, it would nevertheless be appropriate to grant the Application for Certiorari. Because the issue of *Garcia*'s retroactivity is squarely presented and will be decided shortly in the *St. Francis College* case, principles of wise judicial administration counsel in favor of granting the writ and postponing decision for the brief period during which *St. Francis College* is awaiting decision by the Supreme Court. If, as Petitioners believe, the Third Circuit will be reversed in *St. Francis College*, then upon such a reversal this Court may enter a summary order reversing the decision of the Intermediate Court of Appeals, thus obviating the necessity of applying to the Supreme Court for a writ of certiorari, and relieving the Supreme Court of the burden of correcting what will be, in such an event, a manifest error of federal statutory interpretation.

IV. CONCLUSION.

For the foregoing reasons, Petitioners Shintaku and Golden respectfully request that this Court grant the application for a writ of certiorari and reverse the Intermediate Court of Appeals' decision insofar as it reinstates Counts XV and XVI of the Complaint. In the alternative, Petitioners request that this Court grant certiorari but postpone decision pending resolution of the questions presented in *St. Francis College v. Al-Khazraji Majid*, No. 85-2169, *cert. granted*, 55 U.S.L.W. 3231 (U.S. Oct. 6, 1986).

Dated: Honolulu, Hawaii, October 20, 1986.

CORINNE K.A. WATANABE

Attorney General

/s/Steven S. Michaels

STEVEN S. MICHAELS

RUSSELL A. SUZUKI

Deputy Attorneys General

Attorneys for Defendants

Appellees State, Shintaku,

Golden, and Goya

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing were duly served upon the following by placing the same into the United States mail, first class postage prepaid, addressed as follows, on October 20, 1986:

DONALD D. COWAN
Armed Forces YMCA
250 South Hotel Street
Room 46D
Honolulu, Hawaii 96813

Dated: Honolulu, Hawaii, October 20, 1986.

/s/Steven S. Michaels
STEVEN S. MICHAELS
Deputy Attorney General

APPENDIX N

**STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
STATE CAPITOL
HONOLULU, HAWAII 96613
(808) 546-4740**

December 1, 1986

**FILED
1986 DEC 1 PM 3:51
/s/ SANDRA N. YASUI
CLERK SUPREME COURT**

The Honorable Herman Lum
Chief Justice, Supreme Court of Hawaii
Aliiolani Hale
Honolulu, Hawaii 96813

Dear Chief Justice Lum:

Re: Cowan v. State of Hawaii, et al.
Supreme Court No. 10256

This is to inform the Court that the defendants-appellees, Judge Harold Y. Shintaku and Dr. Arnold B. Golden, by and through their counsel, the Attorney General, State of Hawaii, and her undersigned deputy, have reviewed their previously filed petition and memorandum in support of petition for certiorari, and believe no further material need be filed. Accordingly, defendants-appellees Shintaku and Golden request that the Court proceed to consider and decide the merits of the issues raised by their petition for certiorari.

107a

Very truly yours

/s/RUSSELL SUZUKI

RUSSELL SUZUKI

Deputy Attorney General

cc: Donald D. Cowan, Esq.

Steven H. Levins, Esq.

Deputy Corporation Counsel

City and County of Honolulu

APPENDIX O

No. 10256

IN THE SUPREME COURT OF
THE STATE OF HAWAII

DONALD D. COWAN,

Plaintiff-Appellant,

vs.

STATE OF HAWAII, CITY AND
COUNTY OF HONOLULU,
HAROLD Y. SHINTAKU, SANDRA
ALEXANDRA, ARNOLD B.
GOLDEN and LAWRENCE A.
GOYA,

Defendants-Appellees,

and

KEN T. KUNIYUKI,

Defendant.

CIVIL NO. 71638

APPEAL FROM THE CON-
CLUSIONS OF LAW AND
ORDER GRANTING MOTION
TO DISMISS COMPLAINT OR
ALTERNATIVELY FOR
SUMMARY JUDGMENT AS
AGAINST DEFENDANTS
STATE OF HAWAII, HAR-
OLD Y. SHINTAKU, ARNOLD
B. GOLDEN AND LAW-
RENCE A. GOYA, FILED
JUNE 14, 1983; AND ORDER
GRANTING MOTION TO DIS-
MISS COMPLAINT AGAINST
SANDRA ALEXANDER AND
CITY AND COUNTY OF HON-
OLULU, FILED JULY 21,
1983

FIRST CIRCUIT COURT

HONORABLE JAMES H.
WAKATSUKI
HONORABLE PHILIP T.
CHUN
JUDGES

**MOTION FOR RECONSIDERATION
MEMORANDUM IN SUPPORT OF MOTION FOR
RECONSIDERATION [and] CERTIFICATE OF GOOD
FAITH
and CERTIFICATE OF SERVICE**

**FILED
1987 JUL 2 PM 12:45
EUGENE L. SABADO
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Golden, and Goya*

MOTION FOR RECONSIDERATION

Defendants-Appellees and Petitioners on Certiorari, HAROLD SHINTAKU and ARNOLD B. GOLDEN ["Petitioners"], by their counsel, respectfully move this Court to reconsider its Order filed June 23, 1987 "[Order on Certiorari]", affirming the Memorandum Opinion of the Intermediate Court of Appeals filed on September 22, 1986 ["Opinion Below"], and its order denying reconsideration filed October 8, 1986 ["Reconsideration Order"], insofar

as such decisions "vacate the [circuit] court's June 14, 1983 and July 21, 1983 orders of dismissal with respect to the counts, causes of action, and defendants stated in section III" of the Opinion Below, *Cowan v. State of Hawaii et al.*, No. 10256 (Haw. App. Sept. 22, 1986).

On reconsideration, Petitioners respectfully request the Court to reverse its Order on Certiorari and the judgment of the Intermediate Court of Appeals to the extent said Order and judgment are adverse to Petitioners.

This motion is made pursuant to Rule 40 of the Hawaii Rules of Appellate Procedure and is based upon the points of law and fact which this Court has overlooked or misapprehended, including, but not limited to the following:

(1) The Order on Certiorari, which affirms the Opinion Below and the Reconsideration Order "[i]n view of the opinion of the United States Supreme Court in *St. Francis College v. Al-Khazraji*, ___ U.S. ___, 107 S. Ct. 2022, ___ L. Ed. 2d ___, 55 U.S.L.W. 4626 (1987)," overlooks the material decision of the Supreme Court of the United States in the case of *Goodman v. Lukens Steel Co.*, 55 U.S.L.W. 4881 (U.S. June 19, 1987), in which review was granted after all briefs in this case were due. Under *Goodman*, which applies *Wilson v. Garcia*, 471 U.S. 261 (1985), a state's personal injury limitations period, here the two-year period set forth in Haw. Rev. Stat. § 657-7 (1976), must be applied when, at the time the case was filed, here June 7, 1982, there was no "clear precedent" in the court system in which the case was filed, here the *state* courts of Hawaii, "on which [plaintiff] could have relied when [he] filed [his] case." *Goodman*, 55 U.S.L.W. at 4883. The decision in *Goodman* thus strongly warrants reconsideration of this Court's Order applying the decision in *St. Francis College* to the federal question of whether plaintiff's federal civil rights claims stated in Counts XV and XVI of the Complaint under 42 U.S.C. § 1983—the only claims surviving at this state—are time-barred and must be dis-

missed; in light of *Goodman*, reconsideration should be granted, and, on reconsideration, the Order on Certiorari and the judgment of the Intermediate Court of Appeals prejudicial to Petitioners should be reversed as contrary to recently-announced controlling precedent.

(2) Additionally, the Court has overlooked or misapprehended additional recent developments in the doctrine of federal absolute immunity. We believe, for this reason, that this Court misapplied applicable federal law of judicial and quasi-judicial immunity in rejecting without explanation our two absolute immunity claims: (1) that Petitioner Shintaku's claimed actions were not clearly without the subject matter jurisdiction of his office as a matter of law, and that it was incumbent upon the courts of Hawaii, with respect to federal § 1983 claims attacking those actions, to dismiss under *Stump v. Sparkman*, 435 U.S. 349 (1978); and (2) that Petitioner Golden, as a court-appointed psychiatrist, was absolutely immune as a matter of law under even this Court's own understanding of federal immunity law, *Siebel v. Kemble*, 63 Haw. 516, 631 P.2d 173 (1980) (discussing cases); we note, for example, that the Supreme Court has recently granted certiorari to define the contours of absolute judicial immunity in *Forrester v. White*, 792 F.2d 647 (7th Cir. 1986), *cert. granted*, 107 S. Ct. 1282 (1987), and that, while even the dissent in *Forrester* would support Petitioners here, at the least the motion for reconsideration should be granted pending decision in *Forrester*; see also *Moses v. Parwatikar*, 813 F.2d 891 (8th Cir. 1987);

(3) Finally, this Court, without noting any reason to do so, creates an unprecedented federal cause of action arising out of a decision by appointed counsel to assert a mental irresponsibility defense obliging the then-criminal defendant to undergo psychiatric examination. The Court's Order on Certiorari dramatically departs from the standards for effective assistance of counsel set forth in *Jones v. Barnes*, 463 U.S. 745 (1983), and most recently defined

in *Burger v. Kemp*, 55 U.S.L.W. 5131 (U.S. June 26, 1987), handed down after this Court's Order on Certiorari; because the Order on Certiorari errs as a matter of recently-announced federal law, reconsideration should be granted, and the Order on Certiorari and the judgment below adverse to Petitioners should be reversed.

This motion is also based upon the briefs filed and argument held herein, together with the Memorandum in Support of Motion for Reconsideration attached hereto, as well as the records and files in this action.

DATED: Honolulu, Hawaii, July 2, 1987.

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NO 10256
IN THE SUPREME COURT OF
THE STATE OF HAWAII

DONALD D. COWAN,

CIVIL NO 71638

Plaintiff-Appellant,

APPEAL FROM THE CON-
CLUSIONS OF LAW AND
ORDER GRANTING MOTION

vs.

STATE OF HAWAII, CITY AND
COUNTY OF HONOLULU,
HAROLD Y. SHINTAKU, SANDRA
ALEXANDER, ARNOLD B.
GOLDEN and LAWRENCE A.
GOYA,

TO DISMISS COMPLAINT OR
ALTERNATIVELY FOR
SUMMARY JUDGMENT AS
AGAINST DEFENDANTS
STATE OF HAWAII, HAR-
OLD Y. SHINTAKU, ARNOLD
B. GOLDEN AND LAW-
RENCE A. GOYA, FILED
JUNE 14, 1983; AND ORDER
GRANTING MOTION TO DIS-
MISS COMPLAINT AGAINST
SANDRA ALEXANDER AND
CITY AND COUNTY OF HON-
OLULU, FILED JULY 21,
1983

Defendants-Appellees,
and

KEN T. KUNIYUKI,

Defendant.

FIRST CIRCUIT COURT

HONORABLE JAMES H.
WAKATSUKI

HONORABLE PHILIP T.
CHUN
JUDGES

MEMORANDUM IN SUPPORT OF
MOTION FOR RECONSIDERATION

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HONORABLE PHILIP T.
CHUN
JUDGES

MEMORANDUM IN SUPPORT OF
MOTION FOR RECONSIDERATION
ARGUMENT

The Application for Certiorari filed on October 20, 1986,
granted on October 30, 1986, raised the following issues:

1. Whether the immunity to which judges and those performing quasi-judicial functions are entitled when sued in their individual capacities under the federal civil rights statutes, *e.g.*, 42 U.S.C. § 1983, or substantive constitutional principles, bar claims here based on allegations that a Hawaii circuit court judge and court-appointed officials interfered with a criminal defendant's claimed rights not to assert a mental irresponsibility defense and to thus avoid a psychiatric examination required by state law when that defense is raised?

2. Whether, with respect to a claim pursuant to the federal civil rights laws, *e.g.*, 42 U.S.C. § 1983, filed before *Lai v. City and County*, 749 F.2d 588 (9th Cir. 1984), and the overruling decision in *Wilson v. Garcia*, 105 S. Ct. 1938 (1985), the Hawaii courts must follow *Garcia* and apply the personal injury limitations period of two years, which is set forth at Hawaii Rev. Stat. § 657-7 (1976)?

In affirming the decision of the Intermediate Court of Appeals reinstating Counts XV and XVI of the Complaint, which the Intermediate Court of Appeals characterized as a single federal cause of action arising solely under 42 U.S.C. § 1983, *see* Memorandum Opinion at 31, 44, No. 10256 (Haw. App. Sept. 22, 1986) [Opinion Below], this Court's summary Order of June 23, 1987 [Order on Certiorari], states only that "[i]n view of the opinion of the United States Supreme Court in *St. Francis College v. Al-Khazraji*, 107 S. Ct. 2022 (1987) [citations omitted], . . . the Memorandum Opinion of the Intermediate Court of Appeals is affirmed." Although *St. Francis College* is related only to the second issue on the writ, as a matter of federal law this Court's affirmance, if rendered final by denial of reconsideration, will constitute a rejection on the merits of each of Petitioners' claims in this Court, subjecting the decision of this Court to review by the Supreme Court of the United States. *See First English Evangelical Lutheran Church v. County of Los Angeles*, 55 U.S.L.W. 4781, 4783 & n.3 (U.S. June 9, 1987); *Pennsyl-*

vania v. Ritchie, 107 S. Ct. 989, 998 n.8 (1987); *R.J. Reynolds Tobacco Co. v. Durham County*, 107 S. Ct. 499, 505-06 (1986); see also *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985).

Because of intervening decisions of the Supreme Court of the United States of which this Court appears not to have been aware, or could not have been aware, at the time it rendered its Order on Certiorari, because of developments in the federal courts of appeals, and because the grounds for reversal of the adverse judgment of the court below are clear, we ask that this Court reconsider its decision adverse to Petitioners.

On reconsideration, and as suggested below, this Court should reverse the judgment below reinstating Counts XV and XVI of the Complaint filed on June 7, 1982, more than two years after all events of which respondent complains in those counts.

I. This Court's Order on Certiorari Demonstrably Misapplies the Decision in *St. Francis College v. Al-Khazraji*, 107 S. Ct. 2022 (1987), as Shown by the Decision in *Goodman v. Lukens Steel Co.*, 55 U.S.L.W. 4881 (U.S. June 19, 1987).

The issue presented by Question 2 of the Application for Certiorari filed by Petitioners in this Court on October 20, 1986, concerns whether the Intermediate Court of Appeals was correct in relying upon *Gibson v. United States*, 781 F.2d 1334 (9th Cir. 1986), to refuse to apply the two-year personal injury statute of limitations set forth at Haw. Rev. Stat. § 657-7 (1976), to respondent's federal cause of action, as was facially required by *Wilson v. Garcia*, 471 U.S. 261 (1985). In support of our claim that the Intermediate Court of Appeals had erred in refusing to give *Garcia* retroactive effect, we advanced three distinct arguments at pages 11 through 14 of the Application for Certiorari filed herein on October 20, 1986:

First: Because there was no “settled [Ninth] circuit authority,” *Gibson*, 781 F.2d at 1339, as to the proper Hawaii statute of limitations to be borrowed at the time respondent’s § 1983 claims were filed (inasmuch as *Lai v. City and County*, 749 F.2d 588 (9th Cir. 1984), was not handed down until two years *after* respondent’s action was filed in state circuit court), even if this case had been filed in the Ninth Circuit, which it was not, it could not have been timely under *Gibson*;

Second: Even if the lower court’s misreading of *Gibson* were correct, that analysis could not apply to this case since this case was not filed in the lower courts controlled by the Ninth Circuit; rather this case was filed in Hawaii state courts, which are clearly *not* controlled by the precedents of the Ninth Circuit. See *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). Thus, the Intermediate Court of Appeals’ rationale for purporting to following *Gibson*—that “Hawaii is within the Ninth Circuit and not the Sixth Circuit,” Order Denying Appellees’ Motion for Reconsideration at 2, No. 10256 (Haw. App. Oct. 8, 1986), was incorrect. It is the law of the courts in which the action was filed—here the state courts—that governs whether there was law to be relied upon relative to the statute of limitations question. Looking to Hawaii caselaw, there was nothing at the time this case was filed suggesting that the two-year statute would not apply; indeed, it was not until the decision in *Makanui v. DOE*, 721 P.2d 165 (Haw. App. 1986), decided in July of last year, that it was established that § 1983 claims would be heard in the courts of Hawaii at all, much less that the six-year period from Haw. Rev. Stat. § 657-1(4) (1976), governed such claims;

Third: We also argued that if the United States Supreme Court reversed in *St. Francis College*, cert. granted, 55 U.S.L.W. 3231 (U.S. Oct. 6, 1986), where the Third Circuit refused to apply *Garcia* when, at the time the plaintiffs in *St. Francis College* filed suit in the federal District

Court, Third Circuit precedent expressly recognized a longer limitations period than *Garcia* mandated, then the decision of the Intermediate Court of Appeals in this case would also be plainly wrong even if our two foregoing arguments were not correct.

Although the United States Supreme Court's decision in *St. Francis College* did not vindicate our third argument, it strongly suggested that our first two arguments were correct:

The Court of Appeals in this case, however, held that when respondent filed his suit, which was prior to *Wilson v. Garcia*, it was clearly established in the *Third Circuit* that a § 1981 plaintiff had six years to bring an action and that *Goodman* should not be applied retroactively to bar respondent's suit.

Insofar as what the prevailing law was in the Third Circuit, we have no reason to disagree with the Court of Appeals. Under controlling precedent in that Circuit, respondent had six years to file his suit, and it was filed well within that time. See 784 F.2d at 512-13. We also assume but do not decide that *Wilson v. Garcia* controls the selection of the applicable state statute of limitations in § 1981 cases. The Court of Appeals, however, correctly held that its decision in *Goodman* should not be retroactively applied to bar respondent's action in this case. The usual rule is that federal cases should be decided in accordance with the law existing at the time of decision. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.W. 473, 486 n.16 (1981); *Thorpe v. Durham Housing Authority*, 393 U.S. 268, 281 (1969); *United States v. Schooner Peggy*, 1 Cranch 103, *110 (1801). But *Chevron Oil Co. v. Huson*, *supra*, counsels against retroactive application of statute of limitations decisions in certain circumstances. There, the Court held that its decision specifying the applicable state statute of limitations should be applied only prospectively because it overruled *clearly*

established circuit precedent on which the complaining party was entitled to rely, because retroactive application would be inconsistent with the purpose of the underlying substantive statute, and because such application would be manifestly inequitable. The Court of Appeals found these same factors were present in this case and foreclosed retroactive application of its decision in *Goodman*. We perceive no good reason for not applying *Chevron* where *Wilson* has required a Court of Appeals to overrule its prior cases.

St. Francis College, 55 U.S.L.W. 4626, 4627-28 (U.S. Apr. 22, 1987) (emphasis added). Thus, only if *this* Court had handed down *clearly established* precedent on the § 1983 limitations issue *prior to* the filing of the instant claim, and, thus, only if *Wilson* required *this* Court to overrule its precedents on which respondent was "entitled to rely," *id.*, would it be proper to grant respondent an exemption from the plain mandate of *Wilson v. Garcia*. It is plain, given the absence of precedent from Hawaii courts on the procedural issues that arise in § 1983 litigation, that these predicates do not exist here.

Even if it were possible to read the *St. Francis College* case in a contrary fashion, the recent decision in *Goodman v. Lukens Steel Co.*, 55 U.S.L.W. 4881 (U.S. June 19, 1987), makes clearer than ever that our first two arguments why this case must be dismissed under the statute of limitations are right. Preliminarily, it must be stressed that review in *Goodman* was not even *granted* until December 1, 1986, *see* 55 U.S.L.W. 3391 (U.S. Dec. 1, 1986), that is, after the due date of November 30, 1986, set by this Court for supplemental briefs on certiorari, *see* Order, No. 10256 (Haw. Oct. 30, 1986). Because this Court did not cite or discuss the decision in *Goodman*, it can only be presumed that such a failure arises from the Court's unawareness of the developments in the United States Supreme Court, which occurred after all briefs here were due. *See also*

Haw. R. App. P. 31(9); *cf.* Fed. R. App. P. 28(g). The *Goodman* decision, on which this Court has not been briefed by the parties, is a new development that presents strong grounds on which it is appropriate to grant reconsideration on appeal.

Under this recent development, this Court's duty to reverse the adverse decision of the Intermediate Court is plain. The *Goodman* decision squarely holds that it is error as a matter of federal law to permit a § 1983 plaintiff to avoid his state's personal injury statute of limitations when, at the time suit was commenced, there was no clearly established precedent to the contrary in the court system where suit was filed:

Petitioners argue that the same considerations [present in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971)] are present here. We disagree.

It is true, as the petitioners in No. 85-1626 point out, that the Court of Appeals decision in this case overruled prior Third Circuit cases, *Meyers v. Pennypack Woods Home Ownership Assn.*, 559 F.2d 894 (1977); *Davis v. United States Steel Supply, Div. of United States Steel Corp.*, 581 F.2d 335, 338, 341 n.8 (1978), each of which had refused to apply the Pennsylvania 2-year personal injury statute of limitations to the § 1981 claims involved in those cases. But until *Meyers* was decided in 1977, there had been no *authoritative specification* of which statute of limitations applied to an employee's § 1981 claims, and hence *no clear precedent on which petitioners could have relied when they filed their complaint in this case in 1973*. In a later case, *Al-Khazraji v. St. Francis College*, 784 F.2d 505, 512-514 (CA3 1986), the Court of Appeals refused to apply retroactively the same 2-year statute in an employment discrimination § 1981 case [only] because *the case was filed when clear Circuit precedent specified a longer statute. . . .*

As for the remainder of the *Chevron* factors, applying the 2-year personal injury statute, which is wholly consistent with *Wilson v. Garcia* and with the general purposes of statutes of repose, will not frustrate any federal law or result in inequity to the workers who are charged with knowledge that it was an *unsettled* question as to how far back from the date of filing their complaint the damages period would reach. Accordingly, the Court of Appeals properly applied the 2-year statute of limitations to the present case.

Goodman, 55 U.S.L.W. at 4481-83 (emphasis added).

For present purposes, *Goodman*, a recent decision by the Supreme Court of the United States, is squarely dispositive of the instant case, and requires this Court to reverse the Intermediate Court of Appeals' decision adverse to petitioners. As the Seventh Circuit noted in a case in which deference to the decisions of the United States Supreme Court was much more tenuous, "a lower court has no authority to reject a doctrine developed by a higher one." *Olson v. Paine, Webber, Jackson & Curtis, Inc.*, 806 F.2d 731, 734 (7th Cir. 1986). And this rule applies no less to state courts hearing cases under § 1983 than to federal courts hearing such cases. See *Ferri v. Ackerman*, 444 U.S. 913, 198 n.13 (1979).

Because the State of Hawaii is immune from suit in damages actions under § 1983, see *Makanui, supra*, the only defendants remaining here are individual state officials whose personal assets may be levied upon in the event a judgment is entered against them. These individuals, like all who have rights to repose under the congressionally-mandated borrowed limitations periods under the federal civil rights statutes, are entitled to relief when the plaintiff fails to file a timely suit.

In short, under the law that must apply, here "the right to be free of stale claims [must] prevail over the

right to prosecute them.' " *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (quoting *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944)). For the foregoing reasons, reconsideration should be granted and the decision of the Intermediate Court of Appeals, insofar as it is adverse to Petitioners, should be reversed. See *Robinson v. Ariyoshi*, 65 Haw. 641, 660-61, 658 P.2d 287, 302 (1982) (on appellate rehearings).

II. This Court Should Grant Reconsideration so as to Properly Effectuate the Federal Doctrine of Absolute Immunity, Particularly insofar as this Court's Decision Creates a Gaping Conflict with Recent Decisions of the United States Supreme Court and Federal Courts of Appeals.

In failing to reverse on the basis of (or even address) the federal judicial immunity arguments set forth at pages 8 through 10 of the Application for Certiorari filed on October 20, 1986, and which this Court is bound to respect as a matter of federal law, see *Ferri, supra*, this Court also has misconstrued the impact of *Stump v. Sparkman*, 435 U.S. 349 (1978), and mistakenly failed to follow the persuasive decisions governing absolute immunity that have been issued by the lower federal courts, e.g., *Ashelman v. Pope*, 793 F.2d 1072 (9th Cir. 1986) (en banc). For this added reason, reconsideration should be granted and the judgment below adverse to Petitioners reversed.¹

¹ This Court, as we make clear in Part I, *supra*, is not legally obligated to follow the recent decisions of any federal court except the Supreme Court of the United States. If this Court agrees with this basic proposition, it must reverse under the argument stated in Part I, because the material issue under that argument is whether this Court is legally bound by the Ninth Circuit, not whether the Ninth Circuit's decisions are unpersuasive. If the Court disagrees with the argument in Part I, however, it would be sheer casuistry to ignore the claims in this Part. The arguments in this Part and in Part I are of course consistent. Thus, if this Court fails to follow the precedents of the lower federal courts, that itself is not a ground for reversal in the

The reasons why this is so can be most easily seen from another development in the United States Supreme Court occurring while this case has been pending in this Court. In *Forrester v. White*, 792 F.2d 647 (7th Cir. 1986), cert. granted, 107 S. Ct. 1282 (1987), the United States Court of Appeals of the Seventh Circuit held that a state judge's decision whether to fire a probation officer was protected by absolute judicial immunity. See 792 F.2d at 657-68. It is clear that even if the Supreme Court reverses this decision, that it will reaffirm the argument we have made under *Stump*. As even Judge Posner noted in dissent in *Forrester*, whenever a judge's "judicial rulings," *id.* at 662, are implicated, absolute immunity applies. Judge Posner referred in his dissent to the very same holding from *Stump v. Sparkman*, 435 U.S. 349 (1978), upon which we rely in demanding absolute immunity for Petitioner Shintaku: that when a state judge "with general jurisdiction" is called upon to settle "the affairs" of a person of arguable competence, he is not acting "without jurisdiction." *Id.* at 362 & n.11, cited, 792 F.2d at 663 (Posner, J., dissenting). See Application for Certiorari at 9 (quoting similar language from 435 U.S. at 357, 359 n.7). It is inconceivable that the Supreme Court will give any sanction to the narrow construction of absolute judicial immunity employed in this case, even if *Forrester* is reversed.

Because, as we have argued, and as neither the Intermediate Court of Appeals, nor this Court have refuted, Judge Shintaku had explicit jurisdiction under Chapter 560, Haw. Rev. Stat., as well as general jurisdiction under Haw. Rev. Stat. § 603.21.5 (1976), to have a determination made whether respondent was competent to exercise purported rights under *Faretta v. California*, 422 U.S. 806, 821 (1976), absolute immunity for Judge Shintaku is required

United States Supreme Court; it is, however, a factor that will strongly influence whether review will be granted. See United States Supreme Court Rule 17.

under *Stump*. This is so even assuming, as did the lower court, that a federal claim is stated by claims that Judge Shintaku's "conspired to have Cowan's attorney in the district court criminal case against Cowan rely on the defense of mental irresponsibility which Cowan alleges he did not want to rely on rather than on the defense of authorized use of force which Cowan alleges he wanted to rely on." Reconsideration Order at 2, No. 10256 (Haw. App. Oct. 8, 1986).

Even under these allegations, the lower appellate court wrongly denied immunity. Even if Judge Shintaku lacked personal jurisdiction over Respondent, and even if Judge Shintaku agreed, *ex parte*, with defense counsel (who has been dismissed for want of effective service) to use the jurisdiction conferred by law in an improper manner, immunity applies. *Ashelman v. Pope*, 793 F.2d at 1076, 1078 (9th Cir. 1986) (*en banc*) ("judge is entitled to immunity even if there was no personal jurisdiction over the complaining party" and "allegations that a conspiracy produced a certain decision should no more pierce the actor's immunity than allegations of bad faith, personal interest or outright malevolence"). Even giving the complaint a liberal reading, it is clear that respondent wishes to do nothing more than obtain damages for the orders entered by Judge Shintaku. See Opinion Below at 5-6; Complaint ¶¶ 76, 79-80, 84-85, 91-92, 1 R.A. 18, 19. This is exactly what the judicial immunity rule forbids.

This Court's decision to leave Dr. Golden unprotected by absolute immunity is also contrary to the federal quasi-judicial immunity precepts stated in *Siebel v. Kemble*, 63 Haw. 516, 631 P.2d 173 (1981). As the Seventh Circuit noted in *Forrester v. White*, when court-appointed officials provide "crucial advice and information necessary to making . . . decisions" regarding "sentencing, probation and the revocation of parole and probation," they are unquestionably acting in a quasi-judicial capacity, and therefore entitled to absolute immunity. See 792 F.2d at 657 (citing

cases). The case for quasi-judicial immunity is even stronger in this case, because even if plaintiffs' allegations are all true, Dr. Golden was acting pursuant to circuit court orders issued on December 18, 1979, that Dr. Golden determine not merely whether respondent could be sentenced, but whether he could stand trial at all. See Opinion Below at 5-6; Complaint ¶ 84, 1 R.A. 19. This Court's affirmance creates a gaping conflict with the immunity principles stated by the Seventh Circuit in *Forrester*, and with the decision of the Eighth Circuit in *Moses v. Parwatikar*, 813 F.2d 891 (8th Cir. 1987), which was also decided after certiorari was granted in this case and all briefs were filed.

The magnitude of this conflict can be seen by a pertinent quotation from the opinion in *Parwatikar*, in which the Eighth Circuit dismissed as *frivolous* a claim identical to that here:

Recently this court held that "nonjudicial persons who fulfill quasi-judicial functions intimately related to the judicial process have absolute immunity for damage claims arising from their performance of the delegated functions." *Myers v. Morris*, 810 F.2d 1437, 1466 (8th Cir. 1987) (court appointed therapist). As a psychiatrist appointed by the court to conduct a competency examination, Dr. Parwatikar performed functions essential to the judicial process. See *Burkes v. Callion*, 433 F.2d 318 (9th Cir. 1970), *cert. denied*, 403 U.S. 908 (1971); *Miner v. Baker*, 638 F. Supp. 239, 241 (E.D. Mo. 1986) (doctor "enjoys absolute immunity in his performance of the quasi-judicial function of court-appointed psychiatrist").

Also, Dr. Parwatikar's function is analogous to that of a witness in a judicial proceeding. See *Kurzawa v. Mueller*, 732 F.2d 1456, 1458 (6th Cir. 1984). His appointed duties consisted of examining Moses and reporting his findings back to the court. Anything less than absolute immunity would defeat the requirement

that the "paths which lead to the ascertainment of truth . . . be left as free and unobstructed as possible." *Briscoe v. LaHue*, 460 U.S. 325, 33 (1983) (quoting *Calkins v. Sumner*, 13 Wis. 193, 197 (1860)). Without absolute immunity two problems are likely to develop in cases such as this. First, psychiatrists will be reluctant to accept court appointments. This will hurt the indigent criminal defendants who, without sound psychiatric help, may not be able to prove their mental deficiencies. Second, the threat of civil liability may taint the psychiatrist's overall opinions. The disinterested objectivity, so necessary to an accurate competency determination, will be lost. In short, only by granting absolute immunity will the paths to the truth remain open.

813 F.2d at 892. Like the Ninth Circuit in its *en banc* *Ashelman* opinion, the Eighth Circuit agreed that "pleading a conspiracy does not affect absolute immunity." *Id.* at 893. To the extent that the lower court sanctioned such a "conspiracy exception," see Opinion Below at 31 (characterizing the cause of action pleaded at Counts XV and XVI as a claim under § 1983 for "civil conspiracy"), and this Court affirms on this basis, this Court's decision stands contrary to that of every federal court of appeals to have squarely considered this federal question. See *Parwatikar*, 813 F.2d at 893 & nn. 2-4 (citing cases from Fifth, Sixth, Seventh, Tenth, & Eleventh Circuits); but cf. *San Filippo v. United States Trust Co.*, 737 F.2d 254, 255 (2d Cir. 1984) (dictum), *cert. denied*, 470 U.S. 1035 (1985). See also the opinion of Justice White dissenting from the denial of review in *United States Trust Co.*, 470 U.S. at 1037 n.* (noting that review should be granted to resolve the "conspiracy" issue).

For the above reasons, this Court should grant reconsideration and reverse the lower Court, or, in the alternative, grant reconsideration pending decision in *Forrester*

v. White, 792 F.2d 647 (7th Cir. 1986), *cert. granted*, 107 S. Ct. 1282 (1987).

III. This Court Should Grant Reconsideration to Avoid an Unwarranted and Unprecedented Expansion of the Right to Effective Assistance of Counsel, as is Made Clear By the Decision Only Days Ago in *Burger v. Kemp*, 55 U.S.L.W. 5131 (U.S. June 26, 1987).

It is an elementary precept that no claim can be brought under the Civil Rights Act of 1871 unless the plaintiff has been "subjected . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983 (1982). Nowhere in its forty-five page memorandum opinion does the Intermediate Court of Appeals identify the "right, privilege, or immunity secured by the Constitution and laws" that was violated when respondent's duly-appointed criminal defense counsel "filed a Motion for Mental Examination of Defendant." Complaint ¶ 84, 1 R.A. 19. Nor does this Court do so in its Order on Certiorari, even though that question was squarely presented and argued at pages 1, 7, and 8, of Petitioners' Application for Writ of Certiorari.

In fact, it is plain from the lengthy record described by the Intermediate Court of Appeals at pages 1-18 of its memorandum opinion that appointed defense counsel's determination to seek to plead a mental irresponsibility defense to the crimes charged was amply supported, and, accordingly, to waive a defense based on the authorized use of force, was within the established limits of the effective assistance clause.

Even if this Court were not persuaded by our argument that the decision in *Jones v. Barnes*, 463 U.S. 745 (1983), squarely requires reversal, it is apparent that the recent decision of the Supreme Court of the United States in *Burger v. Kemp*, 55 U.S.L.W. 5131 (U.S. June 26, 1987), handed down after this Court's Order on Certiorari,

counsels a contrary result. As the Court made clear in *Burger*, the sole and only question to be decided in an ineffective assistance case is whether a purportedly strategic decision by appointed counsel "undermines confidence in the adversarial process." 55 U.S.L.W. at 5135. In holding that appointed counsel's refusal to present *any* evidence of mitigating factors at a capital sentencing proceeding was not ineffective assistance, the Court stated:

"Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. *Engle v. Isaac*, 456 U.S. 107, 133-134 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland v. Washington*, 466 U.S. [668,] 689 [(1984)].

55 U.S.L.W. at 5135. This Court, in its Order on Certiorari, does not take issue with the Intermediate Court of Appeals' decision to consider matters from the public record on a motion to dismiss, cf. *Papasan v. Allain*, 106 S. Ct. 2931, 2943 (1986), and it is clear from that record that the appointed public defender in this case had overwhelming ground from the civil proceedings prior to April 8, 1980, to believe that a mental irresponsibility defense would be an appropriate response to the charges initiated by HPD Reports M-00566-67. See Opinion Below at 11-13 (describing the affidavit of public defender Goya and noting his reliance on Dr. Golden's report). As in the recently-decided *Burger* case, Goya's decision "had a sound strategic basis," and was the result of a "process of winnowing out weaker

claims . . . and focusing on" those more likely to prevail, [which] far from being evidence of incompetence, is the hallmark of effective . . . advocacy.' " 55 U.S.L.W. at 5134 (quoting *Jones v. Barnes*, 463 U.S. 745, 751, 752 (1983)). Because this Court has overlooked our claim that plaintiff has no federal cause of action under § 1983 (or any of the other Civil War statutes), and the relevant facts subject to judicial notice showing that a motion to dismiss was well-taken for this reason, see *Bullen v. DeRego*, 724 P.2d 106, 110 (Haw. 1986) (citing *State v. Mueller*, 66 Haw. 616, 630, 671 P.2d 1351, 1360 (1983)), and, further, because this Court has not had an opportunity to consider the decision in *Burger v. Kemp*, *supra*, this Court should grant reconsideration and reverse the adverse decision of the Intermediate Court of Appeals.

CONCLUSION

The decisions by the courts of Hawaii to permit federal claims under the Civil War statutes to be heard in state courts are a welcome development that permits our courts, which are most familiar with state institutions and practices, to redress violations of federal law. But precisely because the causes of action created by 42 U.S.C. § 1983 are *federal* causes of action, this Court must give effect to the *federal* defenses mandated by Congress and the decisions of the United States Supreme Court. This holds true no less in cases pleaded by plaintiffs appearing *pro se* than in those brought by the wealthiest corporations armed with the most sophisticated counsel. The decision of the Intermediate Court of Appeals affirmed by this Court's Order of June 23, 1987, loses sight of this basic precept, which Justice Marshall recently described as "the essence of equal justice under law." *Pennzoil Corp. v. Texaco, Inc.*, 107 S. Ct. 1519, 1534 (1987) (Marshall, J., concurring in the judgment).

For the foregoing reasons, and all others stated on certiorari, Petitioners request this Court to grant the mo-

tion for reconsideration, and, on reconsideration, to reverse its Order on Certiorari and the decision of the Intermediate Court of Appeals adverse to Petitioners.

In the alternative, this Court should grant the motion pending the decision of the Supreme Court of the United States in *Forrester v. White*, 792 F.2d 647 (7th Cir. 1986), *cert. granted*, 107 S. Ct. 1282 (1987), which is expected to clarify federal absolute immunity in actions under 42 U.S.C. § 1983.

Because the grounds for reconsideration and reversal are compelling, because the United States Supreme Court will likely not grant review if plaintiffs' claims are completely dismissed on reconsideration, and because it is beneficial to all involved that there be no doubt as to the validity of any decision on reconsideration, Petitioners believe in the interest of justice that this Court should grant respondent an opportunity to respond pursuant to Rule 40(c), Haw. R. App. P., and that the Court may wish to consider inviting a distinguished member of the bar of this Court to brief, as amicus curiae, the cause of respondent in response to the Motion for Reconsideration.

Dated: Honolulu, Hawaii, July 2, 1987.

WARREN PRICE, III
Attorney General

/s/STEVEN S. MICHAELS
STEVEN S. MICHAELS
RUSSELL A. SUZUKI
Deputy Attorneys General

Attorneys for Defendants-
Appellees State, Shintaku,
Golden, and Goya

CERTIFICATE OF GOOD FAITH

I hereby certify, as one of the attorneys for Defendants-Appellees Shintaku and Golden, that this Motion for Re-

consideration is presented in good faith and not for purposes of delay.

DATED: Honolulu, Hawaii, July 2, 1987.

WARREN PRICE, III
Attorney General

/s/STEVEN S. MICHAELS
STEVEN S. MICHAELS
RUSSELL A. SUZUKI
Deputy Attorneys General

Attorneys for Defendants-
Appellees State, Shintaku,
Golden, and Goya

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing were duly served upon the following by placing the same into the United States mail, first class postage prepaid, addressed as follows, on July 2, 1987:

DONALD D. COWAN
1655 Kanunu Street
Apartment 707
Honolulu, Hawaii 96814

Dated: Honolulu, Hawaii, July 2, 1987.

/s/STEVEN S. MICHAELS
STEVEN S. MICHAELS
Deputy Attorney General

APPENDIX P

DONALD D. COWAN
250 S. Hotel Street, #4060
Honolulu, Hawaii 96813
Tel. No. 524-5600

Plaintiff Pro Se

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

DONALD D. COWAN,

CIVIL NO. 71638

Plaintiff,

COMPLAINT; SUMMONS;
AFFIDAVIT OF DONALD D.
COWAN

vs.

STATE OF HAWAII, CITY AND
COUNTY OF HONOLULU,
HAROLD Y. SHINTAKU, SANDRA
ALEXANDER, KEN. T.
KUNIYUKI, ARNOLD B. GOLDEN,
LAWRENCE A. GOYA,

Defendants

1ST CIRCUIT COURT
STATE OF HAWAII
FILED
1982 JUN 7 PM 4:12
B. NAKAMAEJO
CLERK

COMPLAINT

COMES NOW the Plaintiff above-named, representing himself as Plaintiff Pro Se, and for his complaint against Defendants above-named, alleges and avers as follows:

COUNT 1

1. That Plaintiff is, and was at all times relevant and material hereto, a citizen and resident of the City and County of Honolulu, State of Hawaii, presently residing at the Armed Services YMCA at 250 S. Hotel Street, City and County of Honolulu, State of Hawaii.

2. Defendants HAROLD Y. SHINTAKU, SANDRA ALEXANDER, KEN T. KUNIYUKI, DR. ARNOLD B. GOLDEN, are, and at all times material hereto, were citizens and residents of the City and County of Honolulu, State of Hawaii, whose present addresses are not known to Plaintiff.

3. That defendant LAWRENCE A. GOYA at all times material hereto, was a citizen and resident of the City and County of Honolulu, State of Hawaii, whose present address is only known to Plaintiff as residing on the island of Maui, State of Hawaii.

4. That defendant STATE OF HAWAII was at the times relevant and material hereto the employer and respondeat-superior of defendants HAROLD Y. SHINTAKU (hereinafter "SHINTAKU"), LAWRENCE A. GOYA (hereinafter "GOYA"), and DR. ARNOLD B. GOLDEN (hereinafter "GOLDEN").

5. That CITY AND COUNTY OF HONOLULU, is the employer of Deputy Prosecuting Attorney SANDRA ALEXANDER (hereinafter "ALEXANDER"), and is here respondeat-superior, and is furthermore the respondeat-superior to the city and country agency of the Prosecuting Attorneys Office; the CITY AND COUNTY OF HONOLULU may also be the respondeat-superior of GOLDEN and GOYA.

6. On July 23, 1979, Plaintiff was served with an Order to Show Cause why he should not be held in contempt of court. Said order, which contained no specification of the type of contempt as being either "civil" or "criminal" but

was in substance an accusation of *indirect criminal* contempt of court, was drafted by defendant KUNIYUKI (hereinafter "KUNIYUKI") and signed by SHINTAKU.

7. Three and one-half days later, on July 27, 1979, Plaintiff appeared at the show-cause hearing as ordered. Defendant appeared without counsel and informed SHINTAKU that Plaintiff had asked for legal assistance for the show-caused hearing from the Public Defenders Office and from Legal Aid Society, but was refused assistance in this *civil* case, and that Plaintiff then requested two private attorneys for assistance but was told they would render assistance only if they were paid a \$500.00 retainer in advance which Plaintiff lacked the means to pay. Plaintiff then informed SHINTAKU that he didn't know how to defend himself in Court. SHINTAKU *did not* thereupon make an inquiry into Plaintiff's indigency status or refer Plaintiff to the Public Defenders Office, but merely stated, "I'll help you along," and proceeded with what turned out to be a trial.

8. The Plaintiff was denied his U.S. and Hawaii Constitutional rights and Hawaii statutory rights to representation by *legal counsel*, *trial by jury*, and several other fundamental trial rights. Plaintiff *was not charged as required by law*. Prosecution of the contempt case was *unlawfully done by private attorney KUNIYUKI*, and a verdict was rendered by the unlawful, expressly announced standard of proof of "*by a preponderance of the evidence.*" Plaintiff was unlawfully *summarily* convicted. The offense of which he was said to be convicted was of what constitutes a nonstatutory offense of an "*unspecified type*" of contempt, labeled by SHINTAKU as "*is in contempt.*" Plaintiff was sentenced at that same show-cause hearing to an unlawful *term* of six months imprisonment and \$500.00 fine. SHINTAKU suspended the sentence for the unlawful period of time of thirteen (13) months.

9. SHINTAKU did not notify Plaintiff of his right to appeal, and did not ever appoint counsel for Plaintiff for purposes of appealing the conviction.

10. As a direct and proximate result of the deprivation of U.S. and Hawaii Constitutional rights and Hawaii statutory rights of an Accused of a crime, Defendant has been inflicted with and/or suffered serious shock, emotional distress, anxiety and emotional pain and suffering, and will continue to suffer the same in the future by reason whereof he has sustained special damages in an amount not presently ascertainable with specificity, as to which Plaintiff prays leave of this Court to amend this Complaint to show the same at the time of trial, and general damages in excess of \$200,000 from each of defendants STATE OF HAWAII, KUNIYUKI and SHINTAKU, and punitive damages against defendants KUNIYUKI and SHINTAKU to be proven a trial.

COUNT II

11. Paragraphs 1 through 10 are incorporated by reference as if incorporated herein.

12. That on August 30, 1979, a hearing was held on a Second Motion for Order to Show Cause. The accusations were substantively of *indirect criminal* contempt of court, but no such designation appeared on the order. The proceeding commenced with SHINTAKU seating himself and immediately glaring at Plaintiff and proclaiming, "I'm going to send him to jail" before one word of evidence was presented to the Court. Plaintiff again appeared with no counsel to represent him. SHINTAKU did not make any inquiry into Plaintiff's indigency status, and did not refer Plaintiff to the Public Defenders Office. Trial commenced with private attorney KUNIYUKI unlawfully acting as a prosecutor. At the close, SHINTAKU appeared ready to revoke Plaintiff's sentence of imprisonment, but asked "Where are you presently working." When Plaintiff

replied he was presently working at Goodsill Anderson & Quinn, SHINTAKU expressed surprise and immediately recessed the hearing, directing someone to call that firm to order Plaintiff's bosses to the judge's chambers in 15 minutes.

13. Plaintiff's two attorney bosses appeared in 15 minutes as ordered, and spoke privately with SHINTAKU. SHINTAKU reconvened the hearing and announced he would not impose sentence upon Plaintiff as long as he was employed, and adjourned the hearing.

14. Plaintiff's two attorney bosses went back to Goodsill Anderson and Quinn and related to the office manager that Plaintiff had "annoyed" them, and Plaintiff was banned from working ever again at that office, despite Plaintiff's having been highly praised for previous assignments at Goodsill Anderson & Quinn, and having been approached by the office manager to apply for a full-time job as word-processor for that firm. The ban against Plaintiff working at at Goodsill Anderson and Quinn remains in effect as of the filing date of this Complaint.

15. As a direct and proximate result of the deprivation of U.S. and Hawaii Constitutional and Hawaii Statutory rights as an Accused on August 30, 1979, and as a result of the outrageously unnecessary order to appear and slanderous conference with Plaintiff's supervisors at Goodsill Anderson and Quinn, Plaintiff, COWAN, has been inflicted with and/or suffered serious shock, emotional distress, anxiety and emotional pain and suffering, and will continue to suffer the same in the future by reason whereof he has sustained special damages in an amount not presently ascertainable with specificity, as to which Plaintiff prays leave of this Court to amend this Complaint to show the same at the time of trial, and general damages in excess of \$200,000 from each of defendants STATE OF HAWAII, KUNIYUKI and SHINTAKU, and punitive damages from SHINTAKU and KUNIYUKI to be proven at trial.

COUNT III

16. Paragraph 1 through 15 are incorporated by reference as if incorporated herein.

17. That on December 11, 1979, a hearing was held on a Motion to Impose Sanctions on Defendant, filed by KUNIIYUKI. Plaintiff appeared without counsel, and SHINTAKU made no inquiry into Plaintiff's indigency status, and did not refer Plaintiff to the Public Defenders Office. The hearing was in regard to accusations substantively of indirect criminal contempt of court, but were not specified by said motion or its attached memorandum.

18. The hearing opened by KUNIIYUKI calling a surprise witness, Deputy Prosecuting Attorney ALEXANDER, an employee of defendant CITY AND COUNTY OF HONOLULU, to take the stand. Plaintiff was given no notice whatsoever that ALEXANDER was to appear, or what she would say, in violation of H.R. § 706-627 which *required written notice* to a defendant of all grounds to be *considered* for revocation of a suspended sentence. ALEXANDER gave her opinion that Plaintiff had "harassed" and "threatened" her on the telephone by allegedly saying to her "And I'm going to teach you a big lesson." Plaintiff was then given the chance to cross-examine ALEXANDER. In the course of that "cross-examination" ALEXANDER further testified that she had been invited to a houseparty given by some friends of this Plaintiff, and in talking to this Plaintiff's housemates, she came to know for a fact that Plaintiff's friends "were hardly friends." Plaintiff was then asked by SHINTAKU if he would like to take the stand, and Plaintiff did so. Plaintiff explained that ALEXANDER had called his church and made inquiries to the church secretary of such a nature that Plaintiff felt concerned they might have harmed his reputation there; that Plaintiff had then called ALEXANDER and asked if he could provide her with any information; that Plaintiff asked if a mediation might be set

up between himself and Jeanette Spooone, and ALEXANDER replied she would see, and told Plaintiff to call her back about it; that several days later Plaintiff called ALEXANDER and was told that Plaintiff should go to the 1164 Bishop Street office and talk with a "mediator"; that Plaintiff of his own initiative then voluntarily went to the Prosecuting Attorneys Office and spent about one hour talking with a prosecutor who represented himself as the "mediator" to whom ALEXANDER had referred Plaintiff; that Plaintiff left the office then, and intentionally waited several days to deliberately avoid an appearance of bothering ALEXANDER before telephoning her to check to see if a mediation process would be effected; that when Plaintiff telephoned ALEXANDER she right off spoke in an extremely hostile tone of voice to Plaintiff for no given reason, to which Plaintiff listened quietly, and then ALEXANDER finally said to Plaintiff, *"I'm going to teach you a lesson about how society operates"*; Plaintiff by that time had himself become sufficiently annoyed by Alexander's continuously and unreasonably hostile tone of voice that he responded to her challenge by using some of ALEXANDER's own words, by saying *"And I'm going to teach you a big lesson about people"*, that ALEXANDER then said, *"You'd better be careful,"* whereupon both ALEXANDER and Plaintiff hung up; and Plaintiff made no further attempt after that third telephone call to call ALEXANDER again prior to the December 11, 1979 hearing.

19. That at the completion of this testimony by Plaintiff, Plaintiff left the witness stand and returned to his seat, whereupon SHINTAKU announced, *"I've heard enough."* SHINTAKU then announced that Plaintiff was to begin spending weekends in jail, and that he was to be examined by a psychiatrist pursuant to KUNIYUKI'S request; there was no discussion whatsoever of Defendant's sanity, evidence given in respect thereto, or reason given why Defendant should be examined.

20. That Plaintiff, with no counsel to advise him, believed therefore that he had to look forward to spending jail in weekends upon any whim of the opposing side in Civil No. 57584; that Plaintiff calculated that six months imprisonment served at the rate of two days per week meant being liable to imprisonment on weekends for a very long time; that this Defendant not knowing any other recourse available to him thus asked SHINTAKU to impose the maximum amount of imprisonment *already assessed* against him, in order that he could get the imprisonment *over and done with in one period*, rather than spending weekends in jail for a very long time.

21. That SHINTAKU replied, "If you ask that, I cannot refuse."

22. SHINTAKU then announced that Plaintiff was to be imprisoned for a term of six months. SHINTAKU asked ALEXANDER to assist him in "making arrangements" for sending Defendant to jail, and ALEXANDER, an experienced professional deputy prosecuting attorney of the City and County of Honolulu in criminal cases, who did or should have known that the proceeding was a penal proceeding, and recognized or should have recognized it was an *unlawful* penal proceeding, so assisted SHINTAKU in arranging for Plaintiff to unlawfully be sent to jail for six months.

23. As a direct and proximate result of the denial of Plaintiff's U.S. and Hawaii Constitutional and Hawaii statutory rights as an Accused, especially the denial of his H.R.S. §706-627 rights regarding suspension-revocation hearings, and denial of his H.R.S. 802-1 right to assistance of an attorney when *threatened* with confinement in a psychiatric or mental institution, Plaintiff, COWAN, has been inflicted with and /or suffered serious shock, emotional distress, anxiety and emotional pain and suffering, and will continue to suffer the same in the future by reason whereof he has sustained special damages in an amount not

presently ascertainable with specificity, as to which Plaintiff prays leave of this Court to this Complaint to show the same at the time of trial, and general damages in excess of \$500,000 from each of defendants STATE OF HAWAII, SHINTAKU, KUNIYUKI, ALEXANDER and CITY AND COUNTY OF HONOLULU, and punitive damages from SHINTAKU, KUNIYUKI and ALEXANDER to be proven at trial.

COUNT IV

24. Paragraphs 1 through 23 are incorporated by reference as if incorporated herein.

25. That on December 11, 1979, Plaintiff was transported to what is now known as Halawa High Security Facility, and about one day later transferred to Keehi Annex, where Plaintiff was unlawfully imprisoned by illegal authority of a Mittimus dated December 11, 1979, which was void on its face by falsely reciting that Plaintiff had been "duly adjudged guilty in said Circuit Court of the offense of CIVIL CONTEMPT OF COURT", by unlawfully stating a *term* of imprisonment, and which Mittimus unlawfully failed to contain a specified act as *required by H.R.S. § 710-1077(6)* for a conviction for civil contempt, which Plaintiff could perform while imprisoned to obtain his release from the imprisonment. Plaintiff was thus *unlawfully deprived of his liberty* from December 11, 1979 until January 28, 1980.

26. As a direct and proximate result of the unlawful deprivation of Plaintiff's liberty between December 11, 1979 and January 28, 1980, Plaintiff, COWAN, has been inflicted with and /or suffered serious shock, emotional distress, anxiety and emotional pain and suffering, and will continue to suffer the same in the future by reason whereof he has sustained special damages in an amount not presently ascertainable with specificity, as to which Plaintiff prays leave of this Court to amend this Complaint

to show the same at the time of trial, and general damages in excess of \$500,000 from each of defendants STATE OF HAWAII, SHINTAKU KUNIYUKI, ALEXANDER and CITY AND COUNTY OF HONOLULU, and punitive damages from SHINTAKU, KUNIYUKI and ALEXANDER to be proven at trial.

COUNT V

27. Paragraphs 1 through 26 are incorporated by reference as if incorporated herein.

28. That on one day between January 3, 1980 and January 9, 1980, defendant GOLDEN appeared at Keehi Annex to conduct a psychiatric examination of Plaintiff. Plaintiff informed GOLDEN that he had been denied legal counsel, and told GOLDEN furthermore that Plaintiff did not wish to cooperate with any psychiatric examination, in violation of the oath GOLDEN took as a state employee to uphold the constitution of the State of Hawaii, which constitution contains Article 1, Section 14, guaranteeing counsel to an indigent Defendant charged with an offense punishable by imprisonment; GOLDEN negligently, recklessly or willfully conducted an illegal psychiatric examination of Plaintiff despite being aware Plaintiff was being denied his right to be represented by counsel, and Plaintiff's being denied his right to not be involuntarily psychiatrically examined without appointed counsel to represent him.

29. That GOLDEN disseminated a report of that illegal psychiatric examination to the Court and others, which report was not illegal, but which wrongfully and seriously slandered and harmed the reputation of Plaintiff, and drew improper conclusions from Plaintiff's legitimate desire to not be examined; Plaintiff was denied a timely copy of the January 8, 1980 report in violation of Rule 35(a)(1) HRCF and H.R.S. § 704-404(6), and denied timely opportunity to contest the report.

30. As a direct and proximate result of the unlawful psychiatric examination made in violation of Plaintiff's rights as an Accused, and one threatened by confinement against his will in any psychiatric or other mental institution or facility, using as evidence Plaintiff's reluctance to be psychiatrically examined under the circumstances, and by dissemination of the report of the illegal psychiatric examination, Plaintiff, COWAN, has been inflicted with and/or suffered serious shock, emotional distress, anxiety and emotional pain and suffering, and will continue suffer the same in the future by reason whereof he has sustained special damages in an amount not presently ascertainable with specificity, as to which Plaintiff prays leave of this Court to amend this Complaint to show the same at the time of trial, and general damages in excess of \$200,000 from each of defendants STATE OF HAWAII, SHINTAKU, KUNIYUKI, GOLDEN, ALEXANDER and CITY AND COUNTY OF HONOLULU, and punitive damages from defendants SHINTAKU, KUNIYUKI, GOLDEN and ALEXANDER to be proven at trial.

COUNT VI

31. Paragraphs 1 through 30 are incorporated by reference as if incorporated herein.

32. Sometime between January 8 and January 28 1979, while Plaintiff was still unlawfully imprisoned at Keehi Annex, Plaintiff's record of money on his account held by Keehi Annex was routinely allowed to be inspected by a prisoner. Such a highly dangerous practice resulted in word being passed to other prisoners that Plaintiff had two paychecks stored "on the books".

One prisoner approached Plaintiff, recited the exact amount to the penny being held by Plaintiff "on the books", and told Plaintiff to transfer \$100.00 of Plaintiff's money to his account or else he would have Plaintiff beaten every day. When Plaintiff refused to pay, several prisoners

approached Plaintiff, pushed Plaintiff into a dormitory bathroom, and Plaintiff was struck very hard in his right side on his ribs. Plaintiff then agreed to pay off, but immediately went straight to a guard at his first opportunity, and informed of what happened. The prisoner who had initiated the extortion and the prisoner who had actually struck Plaintiff were then punished by being transferred to Halawa High Security Facility. Plaintiff, for his own safety, was also transferred to Hawala High Security Facility, and was met by the two other prisoners. Those prisoners passed word around Halawa that Plaintiff was to be beaten at the first opportunity, and Plaintiff was then subjected to constant harassment and threats from many other prisoners for the duration of the term of his imprisonment.

As a result of being struck in his ribs, Plaintiff received bruised ribs and such severe pain that he could not sleep on his right side for approximately six weeks.

33. That officials at Keehi Annex negligently or recklessly disregarded the safety and privacy of prisoners by customarily allowing a prisoner to "handle" prisoner accounts.

34. As a direct and proximate result of the negligent and reckless disclosure of Plaintiff's account, and the negligent or reckless disregard of the possibility of extortion occurring therefrom, and as a result of the beating of Plaintiff and injury therefor, Plaintiff, COWAN, has been inflicted with and/or suffered serious shock, emotional distress, anxiety and emotional pain and suffering, and will continue to suffer the same in the future by reason whereof he has sustained special damages in an amount not-presently ascertainable with specificity, as to which Plaintiff prays leave of this Court to amend this Complaint to show the same at the time of trial, and general damages in excess of \$200,000 from each of defendant's STATE OF HAWAII, SHINTAKU, KUNYUKI, ALEXANDER

and CITY AND COUNTY OF HONOLULU, and punitive damages from defendants SHINTAKU, KUNUYUKI, and ALEXANDER to be proven at trial.

COUNT VII

35. Paragraphs 1 through 34 are incorporated by reference as if incorporated herein.

36. On January 11, 1980, Plaintiff became informed for the first time, by information given to him from a prisoner, that Defendant definitely had the right to the appointment of counsel for his trial, and said prisoner also informed Plaintiff that the relevant laws were contained in the Hawaii Revised Statutes, of which a copy was kept in Keehi Annex's mess hall.

37. Plaintiff then obtained permission for short study periods, and happened across H.R.S. §802-1, where on January 11, 1980, he read for the first time that anyone arrested for, charged with or convicted of an offense punishable by confinement in jail shall be entitled to be represented by a public defender. Plaintiff then searched through other statutes in the Hawaii Penal Code, and with the information he obtained he wrote a letter on or about January 12, 1979, to SHINTAKU which essentially asked for a habeas corpus review of his case, requesting SHINTKU to check if he shouldn't have appointed legal counsel for Plaintiff, asking for legal research assistance, and asking for a new trial and release from jail. Plaintiff's letter was received by the court but ignored until January 28, 1980, when a hearing was held in SHINTAKU's chambers for the re-suspension of Plaintiff's sentence.

38. Present at January 28, 1980 re-suspension hearing were ALEXANDER, KUNUYUKI, GOLDEN, SHINTAKU, and others. Plaintiff was not represented by counsel at that hearing.

39. SHINTAKU first addressed Plaintiff's request for appointment of counsel and wrongly ruled that the "right

to counsel applies to criminal trials and did not apply in this case" and that Plaintiff therefore was not entitled to a lawyer at the July 27, 1979, show-cause hearing, or the December 11, 1979 hearing, and was for the same reason not entitled to appointment of counsel on January 28, 1980, nor entitled to a new trial.

40. SHINTAKU then unlawfully suspended Plaintiff's imprisonment sentence, and released Plaintiff on the vague, unwritten condition that Plaintiff "voluntarily" see a psychiatrist.

41. KINIYUKI, who was present and who was an attorney sworn to defend the constitutions of the United States and Hawaii, and to uphold the laws of the State of Hawaii, failed to so act by speaking up to SHINTAKU, and pointing out his serious due process error. By failing to speak up, he acted negligently, recklessly or willfully in a conspiracy with SHINTAKU, ALEXANDER and GOLDEN to deny Plaintiff his right to counsel to represent him.

42. GOLDEN, also present, likewise failed to speak up and contradict SHINTAKU, as was also his duty as a state employee sworn to defend the constitutions of the United States and Hawaii, and therefore acted in negligent, reckless, knowing or willful conspiracy with SHINTAKU, ALEXANDER and KUNIYUKI to deprive Plaintiff of this constitutional and statutory right to appointed counsel.

43. ALEXANDER, who was present, was not only a trained and licensed attorney sworn to uphold the constitutions of the United States and Hawaii and to uphold the laws of the State of Hawaii, but was furthermore an experienced prosecutor especially familiar with the Hawaii Penal Code and the laws therein, and especially familiar with the rights of an Accused. By failing to speak up and contradict SHINTAKU, she negligently, recklessly, knowingly and/or intentionally participated with SHINTAKU, KUNIYUKI and GOLDEN in a conspiracy to deprive

Plaintiff of his due process right to appointment of counsel for his defense.

44. As a direct and proximate result of the denial of his due process right to appointment of counsel, and by the conspiracy therefor, Plaintiff, COWAN, has been inflicted with and/or suffered serious shock, emotional distress, anxiety and emotional pain and suffering, and will continue to suffer the same in the future by reason whereof he has sustained special damages in an amount not presently ascertainable with specificity, as to which Plaintiff prays leave of this Court to amend this Complaint to show the same at the time of trial, and general damages in excess of \$200,000 from each of defendants STATE OF HAWAII, SHINTAKU, KUNIYUKI, ALEXANDER, GOLDEN and CITY AND COUNTY OF HONOLULU, and punitive damages from SHINTAKU, KUNIYUKI, ALEXANDER and GOLDEN to be proven at trial.

COUNT VIII

45. Paragraphs 1 through 44 are incorporated by reference as if incorporated herein.

46. That on January 28, 1980, Plaintiff was denied his right as provided in the United States Constitution, in the Hawaii State Constitution, and in the statutes of the State of Hawaii, to be unconditionally released from prison on a Writ of Habeas Corpus. Participating in a conspiracy to deny Plaintiff his right of an unconditional release from imprisonment based upon a Writ of Habeas Corpus, were defendants SHINTAKU, KUNIYUKI, ALEXANDER and GOLDEN.

47. As a direct and proximate result of the denial of Plaintiff's right to an unconditional release from imprisonment on a Writ of Habeas Corpus, Plaintiff, COWAN, has been inflicted with and/or suffered serious shock, emotional distress, anxiety and emotional pain and suffering, and will continue to suffer the same in the future by

reason whereof he has sustained special damages in an amount not presently ascertainable with specificity, as to which Plaintiff prays leave of this Court to amend this Complaint to show the same at the time of trial, and general damages in excess of \$1,000,000 from each of defendants STATE OF HAWAII, SHINTAKU, KUNIYUKI, ALEXANDER, GOLDEN and CITY AND COUNTY OF HONOLULU, and punitive damages from SHINTAKU, KUNIYUKI, ALEXANDER and GOLDEN to be proven at trial.

COUNT IX

48. Paragraphs 1 through 47 are incorporated by reference as if incorporated hkerein.

49. As part of an intentional effort to coerce Plaintiff into being examined by a three-member psychiatric panel, SHINTAKU on or about January 14, 1980, asked ALEXANDER to press a charge of Assault Third against Plaintiff in relation to Plaintiff's completely justified use of a single instance of defensive force some ten months earlier to protect his Vespa motorscooter from destruction by being shoved off the edge of an approximately 18-foot, concrete-bottomed ditch by Jeanette Spoone and her boyfriend.

50. The Assault Third charge signed by ALEXANDER on January 21, 1980, was served upon Plaintiff at Halawa High Security Facility just after Plaintiff's letter to SHINTAKU asking for a Writ of Habeas Corpus release from imprisonment, and just before the January 28, 1980 hearing for re-suspension of Plaintiff's sentence.

51. At Plaintiff's re-suspension hearing of January 28, 1980, was ALEXANDER, who indicated that Defendant would not have to worry about the Assault Third charge she had just signed against Plaintiff if Plaintiff would "voluntarily" see a psychiatrist.

52. That the threat and the conspiracy with SHINTAKU, KUNIYUKI and GOLDEN to threaten to press the Assault Third charge against Plaintiff as a lever against Plaintiff to coerce him into seeing a psychiatrist constituted and act of extortion by ALEXANDER and the CITY AND COUNTY OF HONOLULU against Plaintiff, in violation of H.R.S. § 707-764(2)(i), to misuse the power of the office of the CITY AND COUNTY OF HONOLULU to induce and compel Plaintiff by threat of prosecution to submit to being psychiatrically examined and treated against his will.

53. That the pressing of a criminal charge against Plaintiff for the express purpose of making it possible to empanel a three-member panel psychiatric examination of Plaintiff constitutes an abuse of criminal process.

54. As a direct and proximate result of the pressing of the Assault Third Charge as an extortionate threat to induce and compel Plaintiff to submit to psychiatric treatment, and by additionally abusing the criminal process by pressing a criminal charge in order to empanel a three-member psychiatric panel to examine Plaintiff, Plaintiff, COWAN, has been inflicted with and/or suffered serious shock, emotional distress, anxiety and emotional pain and suffering, and will continue suffer the same in the future by reason whereof he has sustained special damages in an amount not presently ascertainable with specificity, as to which Plaintiff prays leave of this Court to amend this Complaint to show the same at the time of trial, and general damages in excess of \$300,000 from each of defendants STATE OF HAWAII, SHINTAKU, KUNIYUKI, GOLDEN, ALEXANDER, and CITY AND COUNTY OF HONOLULU, and punitive damages from defendants SHINTAKU, KUNIYUKI, ALEXANDER and GOLDEN to be proven at trial.

COUNT X

55. Paragraphs 1 through 54 are incorporated by reference as if incorporated herein.

56. On February 5, 1980, Defendant was awakened early in the morning by the pastor of his church and told to accompany him to court. Once in Court, SHINTAKU commenced the hearing by ordering Plaintiff to be led out of the courtroom, for no other purpose than to deny Plaintiff the right to hear what was to be said against him.

57. Once Plaintiff was outside the hearing room, 27 minutes of uncontested, uncontroverted testimony was presented against an unrepresented Plaintiff, including slanderous accusations that Plaintiff may have committed arson at the building of Jeanette Spoone's former attorney, may have made a bomb threat to the office of Jeanette Spoone's condominium residence, and may have made threatening phone calls to the residence of Jeanette Spoone's boss.

58. At the conclusion of the presentation of those accusations and the presentation of other opinions particularly by GOLDEN who gave his estimation to the Court of the need for the institutionalization of Plaintiff *was then afterward* led back into the court room, and immediately instructed that he was to be sent back to jail for four more months to complete the term of six months imprisonment, without being given any knowledge of the accusations and opinions just presented against him.

59. At that February 5, 1980 hearing, Plaintiff was not represented by counsel, had not been given a written notice of the grounds being considered for revocation of his suspended sentence, was denied the right to hear and controvert the testimony that was given for 27 minutes against him, in unmitigated violation of Plaintiff's rights under H.R.S. §706-627.

60. As a direct and proximate result of the denial of Plaintiff's constitutional and statutory rights at the December 11, 1979 hearing to be represented by counsel, to hear and controvert the evidence presented against him, to offer evidence in his defense, and other rights, Plaintiff,

COWAN, has been inflicted with and/or suffered serious shock, emotional distress, anxiety and emotional pain and suffering, and will continue to suffer the same in the future by reason whereof he has sustained special damages in a amount not presently ascertainable with specificity, as to which Plaintiff prays leave of this Court to amend this Complaint to show the same at the time of trial, and general damages in excess of \$100,000 from each of defendants STATE OF HAWAII, SHINTAKU, KUNIYUKI, ALEXANDER, GOLDEN, and CITY AND COUNTY OF HONOLULU, and punitive damages from each of defendants SHINTAKU, KUNIYUKI, ALEXANDER and GOLDEN to be proven at trial.

COUNT XI

61. Paragraphs 1 through 60 are incorporated by reference as if incorporated herein.

62. That a Mittimus issued on February 11, 1979 which was void on its face by falsely stating that Plaintiff had been "duly adjudged guilty in said Circuit Court of the offense of CIVIL CONTEMPT OF COURT", and by unlawfully failing to state a specified act, as *required* by H.R.S. §710-1077(6) for a conviction of civil contempt, which Plaintiff could perform to obtain his release from imprisonment; that Plaintiff was unlawfully imprisoned by unlawful authority of said Mittimus between February 5, 1980 and June 5, 1980, at Halawa High Security Facility, Oahu Community Correctional Center and Kaneohe State Hospital.

63. That SHINTAKU, KUNIYUKI, ALEXANDER and GOLDEN, and their respondeat-superiors STATE OF HAWAII, and CITY AND COUNTY OF HONOLULU, were co-conspirators in said unlawful imprisonment of Plaintiff.

64. As a direct and proximate result of the unlawful imprisonment of Plaintiff from February 5, 1980 until June 5, 1980, Plaintiff, COWAN, has been inflicted with and/

or suffered serious shock, emotional distress, anxiety and emotional pain and suffering, and will continue to suffer the same in the future by reason whereof he has sustained special damages in an amount not presently ascertainable with specificity, as to which Plaintiff prays leave of this Court to amend this Complaint to show the same at the time of trial, and general damages in excess of \$1,000,000 for each of defendants STATE OF HAWAII, SHINTAKU, KUNIYUKI, GOLDEN, ALEXANDER and CITY AND COUNTY OF HONOLULU, and punitive damages from defendants SHINTAKU, KUNIYUKI, ALEXANDER and GOLDEN to be proven at trial.

COUNT XII

65. Paragraphs 1 through 64 are incorporated by reference as if incorporated herein.

66. That Plaintiff went to visit SHINTAKU after being released from imprisonment sometime in July, 1980, and asked, face-to-face of SHINTAKU, of what offense he had convicted Plaintiff; that Shintaku replied, "I convicted you of *criminal contempt*."

67. That SHINTAKU's knowing that he convicted Plaintiff of criminal contempt of court, but issuing a *Mittimus* on February 5, 1980, reciting a conviction of "CIVIL CONTEMPT OF COURT", constituted *criminal contempt of court*, *perjury* and *forgery* on the part of SHINTAKU.

68. That Plaintiff furthermore informed SHINTAKU by letter written on February 19, 1980, only a few days after being re-imprisoned, informing SHINTAKU of Plaintiff's beliefs about the difference between "civil" contempt of court and "criminal" contempt of court, and therefore SHINTAKU was provided the means to know, had every reason to know, the difference between "civil" contempt and "criminal" contempt of court, and to realize that Plaintiff had definitely *not* been convicted of "civil" contempt of court; that all that would have been required for

SHINTAKU to know the difference between "civil" and "criminal" contempt of court would be to have read the statute on contempt of court, H.R.S. §710-1077; but SHINTAKU nevertheless failed to take immediate steps to correct SHINTAKU's criminal contempt of court, perjury and forgery.

69. That SHINTAKU was assisted and encouraged in his contempt of court, perjury and forgery by KUNIYUKI and ALEXANDER, and by respondeat-superiors STATE OF HAWAII and CITY AND COUNTY OF HONOLULU.

70. As a direct and proximate result of the criminal contempt of court, perjury and forgery regarding the mittimus issued on February 5, 1980, Plaintiff, COWAN, has been inflicted with and/or suffered serious shock, emotional distress, anxiety and emotional pain and suffering, and will continue to suffer the same in the future by reason whereof he has sustained special damages in an amount not presently ascertainable with specificity, as to which Plaintiff prays leave of this Court to amend this Complaint to show the same at the time of trial, and general damages in excess of \$1,000,000 from defendants STATE OF HAWAII, SHINTAKU, KINIYUKI, ALEXANDER and CITY AND COUNTY OF HONOLULU, and punitive damages from defendants SHINTAKU, KUNIYUKI and ALEXANDER to be proven at trial.

COUNT XIII

71. Paragraphs 1 through 70 are incorporated by reference as if incorporated herein.

72. Plaintiff's letter of February 19, 1980 constituted a legitimate request for a Writ of Habeas Corpus review of his case and release from imprisonment, under the circumstances of Plaintiff having no appointed counsel to write a better request, and under circumstances of Plaintiff having no further access to law books.

73. As a direct and proximate result of the unlawful denial by SHINTAKU of Plaintiff's right to obtain a proper and reasonable Writ of Habeas Corpus review of his case, and of his right to an unconditional release from imprisonment immediately thereafter, Plaintiff, COWAN, has been inflicted with and/or suffered serious shock, emotional distress, anxiety and emotional pain and suffering, and will continue to suffer the same in the future by reason whereof he has sustained special damages in an amount not presently ascertainable with specificity, as to which Plaintiff prays leave of this Court to amend this Complaint to show the same at the time of trial, and general damages in excess of \$1,000,000 from defendant SHINTAKU, and his respondeat-superior STATE OF HAWAII, and punitive damages from defendant SHINTAKU to be proven at trial.

COUNT XIV

75. Paragraphs 1 through 74 are incorporated by reference as if incorporated herein.

76. Public Defender GOYA entered into this case sometime in between February 5, 1980 and April 1, 1980, as counsel *appointed by District Court* for the *Assault Third case* initiated by ALEXANDER at SHINTAKU's request.

77. Plaintiff asked GOYA for his assistance in helping to appeal or obtain a habeas corpus unconditional release of Plaintiff from the unlawful imprisonment for "civil contempt of court"; GOYA refused, saying that Plaintiff's imprisonment was for a "civil" case, and stating that he therefore had no authority to assist Plaintiff.

78. GOYA then, of his own free will, against Plaintiff's express wishes, drafted an Amended Order of Disposition in Plaintiff's Civil No. 57584 for signature by SHINTAKU, transferring Plaintiff without a hearing to Kaneohe State Hospital; GOYA committed perjury in that document by representing himself as "Attorney for Defendant" in Civil No. 57584.

79. Although GOYA willingly acted in the interests of Jeanette Spooone, SHINTAKU, KUNIYUKI, ALEXANDER and GOLDEN, by acting as *they* desired with the drafting and filing of the Amended Order of Disposition, GOYA did *absolutely nothing to assist Plaintiff* in being unconditionally released from the term of six months unlawful imprisonment.

80. GOYA had not been legitimately appointed as "guardian" for Plaintiff in an H.R.S. §560:5-303 proceeding, such that he was legally authorized to act contrary to Plaintiff's will.

81. SHINTAKU, KUNIYUKI, ALEXANDER and GOLDEN, and their respondeat-superiors STATE OF HAWAII and CITY AND COUNTY OF HONOLULU, participated as co-conspirators.

82. As a direct and proximate result of the imposition of GOYA upon Plaintiff as guardian rather than as legal counsel, and by GOYA's filing and SHINTAKU's signing the Amended Order of Disposition in Civil No. 57584, and by GOYA acting in the interests of the adverse party and SHINTAKU, ALEXANDER, KUNIYUKI and GOLDEN, rather than in Plaintiff's expressed interests, Plaintiff, COWAN, has been inflicted with and/or suffered serious shock, emotional distress, anxiety and emotional pain and suffering, and will continue to suffer the same in the future by reason whereof he has sustained special damages in an amount not presently ascertainable with specificity, as to which Plaintiff prays leave of this Court to amend this Complaint to show the same at the time of trial, and general damages in excess of \$1,000,000 from each of defendants STATE OF HAWAII, SHINTAKU, KUNIYUKI, ALEXANDER, GOYA, GOLDEN and CITY AND COUNTY OF HONOLULU, and punitive damages from defendants SHINTAKU, GOYA, KUNIYUKI, ALEXANDER, and GOLDEN to be proven at trial.

COUNT XV

83. Paragraphs 1 through 82 are incorporated by reference as if incorporated herein.

84. On April 8, 1980, GOYA filed a Motion for Mental Examination of Defendant against Defendant's will, claiming that "*Defendant hereby gives notice of intention to rely on the defense of mental irresponsibility*", which was an act of *perjury* on Goya's part, and furthermore was an act of forgery; *Plaintiff at no time gave his notice that he intended to rely on the defense of mental irresponsibility*; Plaintiff instead *expressly, unequivocally* informed GOYA of Plaintiff's intention to rely on H.R.S. §703-306 for his defense, and asked GOYA to try and contact witnesses in that regard, since Plaintiff was imprisoned in jail and could not contact witnesses himself.

85. GOYA, SHINTAKU, ALEXANDER, KUNIYUKI and GOLDEN conspired together to deprive Plaintiff of his right to *counsel*, to deprive Plaintiff of his right to assert a defense of his own choosing, and to illegally impose GOYA acting upon Plaintiff as his "guardian" instead of as "counsel", and to thereby file a forged, false statement of Plaintiff's intention to rely upon the defense of mental irresponsibility.

86. As a direct and proximate result of the filing of the Motion for Mental Examination of Defendant, containing the false statement that "*Defendant hereby gives notice to rely on the defense of mental irresponsibility*," which deprived Plaintiff of his right to make a proper and legitimate defense other than an insanity plea, and because of the act of perjury and forgery in so giving that written notice to District Court, Plaintiff, COWAN, has been inflicted with and/or suffered serious shock, emotional distress, anxiety and emotional pain and suffering, and will continue to suffer the same in the future by reason whereof he has sustained special damages in an amount not presently ascertainable with specificity, as to which

Plaintiff prays leave of this Court to amend this Complaint to show the same at the time of trial, and general damages in excess of \$1,000,000 for each of defendants STATE OF HAWAII, SHINTAKU, GOYA, ALEXANDER, KUNIYUKI, GOLDEN and CITY AND COUNTY OF HONOLULU, and punitive damages from defendants SHINTAKU, GOYA, ALEXANDER, KUNIYUKI and GOLDEN to be proven at trial.

COUNT XVI

87. Paragraphs 1 through 86 are incorporated by reference as if incorporated herein.

88. That on April 8, 1980, GOYA filed an Order for Examination of Defendant and Appointing Examiners for the Court's signature.

89. The Order for Examination of Defendant and Appointing Examiners was unlawfully made without a reasonable and appropriate hearing thereon as required by law.

90. The Court was improperly influenced by the illegal psychiatric examination made of Plaintiff by GOLDEN on January 8, 1980, which report was somehow provided to District Court by someone other than Plaintiff; Plaintiff was willfully and unlawfully denied a copy of GOLDEN's report in sufficient time that he could contest the conclusions therein prior to its influencing District Court's decision.

91. That Plaintiff was examined against his will, after District Court had been improperly influenced by the illegal examination and report by GOLDEN on January 8, 1980, which report was given to District Court by someone other than Plaintiff, and examined without a *required reasonable hearing* by District Court on the matter; that District Court was improperly privately influenced by GOYA; that a conspiracy to improperly influence District Court

to order the three-member psychiatric examination of Plaintiff existed between SHINTAKU, ALEXANDER, KUNIYUKI, GOLDEN and GOYA.

92. As a direct and proximate result of the seeking of the Order for Examination of Defendant and Appointment of Examiners by GOYA unlawfully acting as Plaintiffs guardian, and of the conspiracy to improperly influence District Court to order the exam particularly by an uncontested psychiatric report by GOLDEN unlawfully withheld from Plaintiff, and by Plaintiff thereby being needlessly examined, and against his will, by three psychiatrists who made reports thereon, Plaintiff, COWAN, has been inflicted with and/or suffered serious shock, emotional distress, anxiety and emotional pain and suffering, and will continue to suffer the same in the future by reason whereof he has sustained special damages in an amount not presently ascertainable with specificity, as to which Plaintiff prays leave of this Court to amend this Complaint to show the same at the time of trial, and general damages in excess of \$1,000,000 from each of Defendants STATE OF HAWAII, SHINTAKU, GOYA, ALEXANDER, KUNIYUKI, GOLDEN and CITY AND COUNTY OF HONOLULU, and punitive damages from defendants GOYA, SHINTAKU, ALEXANDER, KUNIYUKI and GOLDEN to be proven at trial.

COUNT XVII

93. Paragraphs 1 through 92 are incorporated by references as if incorporated herein.

94. On July 10, 1980, Plaintiff was tried in District Court for the full misdemeanor grade of Assault in the Third Degree. Plaintiff was tried at the full misdemeanor grade despite the fact that Assault in the Third Degree is a *petty* misdemeanor where the person he has used force against has consented to a fight or scuffle, and despite it being *known* to the Prosecuting Attorneys Office and ALEX-

ANDER by Spooone's own admissions that Plaintiff was in fact the person *initially* assaulted, who had *initially* run from his attackers rather than engage in fighting, and who had only used force *after* Plaintiff's Vespa motorscooter had been threatened with irreparable, total-loss destruction by Jeanette Spooone and her boyfriend when they could not otherwise get Plaintiff to engage in a fight with them.

95. The Prosecuting Attorneys Office obtained a conviction by negligent, reckless or willful *perpetrating fraud* upon the trial court by negligently, recklessly or willfully misrepresenting to the court the false notion that there existed no statutory privilege to protect one's property by use of force, and thereby *fraudulently denied the existence of the contents of H.R.S. § 703-306 to District Court*; the Plaintiff was prosecuted for using one single instance of force, without using a weapon, in obvious protection of his property, while the Prosecuting Attorneys Office granted unlawful *total immunity* from prosecution to Spooone, her boyfriend, and Belcher, for their admissions made under oath of their *felonious assaults* upon Plaintiff, and despite their assaults being known by ALEXANDER and the Prosecuting Attorneys Office to have resulted in Plaintiff's arm being broken and wounded; that Plaintiff's being prosecuted for his use of force, while Spooone, Ellison and Belcher were granted total immunity from prosecution for their unlawful use of force against Plaintiff which included the initial throwing of a large rock, unlawful seizing of Plaintiff's motorscooter, and soon following striking with and throwing of a cane at Plaintiff, with expressly admitted intentions to injure Plaintiff, constituted unlawful *discriminatory enforcement of the law*, and unlawful *denial to Plaintiff of his constitutional right to equal protection of the laws*.

96. That Plaintiff, by great effort, and a tremendous loss of time to himself, won as defendant pro se, after dismissing the Public Defenders Office, vacating of that false conviction, and ultimately won a dismissal with prej-

udice of the false, contrived Assault Third charge instituted by Alexander.

97. That prosecution of the Plaintiff in the Assault Third case constituted malicious prosecution of him, done with willful malice towards Plaintiff.

98. As a direct and proximate result of the discriminatory enforcement of the laws, and denial of Plaintiff's right to the equal protection of laws, and by the conducting of a malicious prosecution for assault third against Plaintiff, Plaintiff, COWAN, has been inflicted with and/or suffered serious shock, emotional distress, anxiety and emotional pain and suffering, and will continue to suffer the same in the future by reason whereof he has sustained special damages in an amount not presently ascertainable with specificity, as to which Plaintiff prays leave of this Court to amend this Complaint to show the same at the time of trial, and general damages in excess of \$1,000,000 from each of defendants STATE OF HAWAII, SHINTAKU, ALEXANDER, KUNIYUKI, GOLDEN and CITY AND COUNTY OF HONOLULU, and punitive damages from SHINTAKU, ALEXANDER, KUNIYUKI, and GOLDEN to be proven at trial.

COUNT XVII

99. Paragraphs 1 through 97 are incorporated by reference as if incorporated herein.

100. Plaintiff was prosecuted maliciously in the contempt of court case of Civil No. 57584; furthermore, the conviction, imprisonment and psychiatric examination in Civil 57584, regarding contempt of court, each constituted an *abuse of civil process*.

101. As a direct and proximate result of the malicious prosecution of Plaintiff in the contempt of court case in Civil No. 57584, and of the abuses of civil process therein, Plaintiff, COWAN, has been inflicted with and/or suffered

serious shock, emotional distress, anxiety and emotional pain and suffering, and will continue to suffer the same in the future by reason whereof he has sustained special damages in an amount not presently ascertainable with specificity, as to which Plaintiff prays leave of this Court to amend this Complaint to show the same at the time of trial, and general damages in excess of \$1,000,000 from each of defendants STATE OF HAWAII, SHINTAKU, KUNIYUKI, ALEXANDER, GOLDEN, GOYA and CITY AND COUNTY OF HONOLULU, and punitive damages from defendants SHINTAKU, KUNIYUKI, ALEXANDER, GOLDEN and GOYA, to be proven at trial.

WHEREFORE, Plaintiff, DONALD D. COWAN, prays that:

1. This Court enter judgment in Plaintiff's favor and against Defendants, in respect to Counts I through XVIII, for the special, general and punitive damages indicated therein.

2. Costs of the above-captioned matter and attorneys fees.

3. Declaratory relief in the form of the declaring as *null and void*, and complete *expungment* from all records located anywhere, by every type of information recording, the documents, judgments, findings of fact, examinations, and other records contained in or caused by Civil No. 57584 and the dismissed-with-prejudice CR. No. 5545 which the Court finds have been unlawfully, improperly or unjustly perpetrated upon Plaintiff.

4. For such other and further relief as this Court may deem just and appropriate.

DATED: Honolulu, Hawaii, June 7, 1982.

/s/Donald D. Cowan
DONALD D. COWAN
Plaintiff Pro Se

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

DONALD D. COWAN

CIVIL NO. _____

Plaintiff,

AFFIDAVIT OF DONALD D.
COWAN

vs.

STATE OF HAWAII, CITY AND
COUNTY OF HONOLULU,
HAROLD Y. SHINTAKU, SANDRA
ALEXANDER, KEN T. KUNIYUKI,
ARNOLD B. GOLDEN,
LAWRENCE A. GOYA,

Defendants.

AFFIDAVIT OF DONALD D. COWAN

STATE OF HAWAII SS.

CITY AND COUNTY OF HON-
OLULU

DONALD D. COWAN, being first duly sworn on oath,
deposes and says:

1. That your Affiant is the Plaintiff in the above-cap-
tioned matter and has read the foregoing Complaint, and
the factual allegations contained therein are true to the
best of his knowledge, information and belief.

FURTHER AFFIANT SAYETH NAUGHT.

DATED: Honolulu, Hawaii, June 7, 1982.

/s/ Donald D. Cowan
DONALD D. COWAN
Plaintiff Pro Se

Subscribed and sworn to before me
this 9th day of June, 1982.

/s/ Edwmund K. U. Yee

Notary Public, First Judicial
Circuit, State of Hawaii

My commission expires: 5/18/86

APPENDIX Q

TANY S. HONG 821
Attorney General
State of Hawaii

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Deputy Capitol
415 South Beretania Street
Honolulu, Hawaii 96813
Telephone No.: 548-4740

Attorneys for State of
Hawaii, Arnold B. Golden and
Harnold Y. Shintaku

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

DONALD D. COWAN,

CIVIL NO. 71638

Plaintiff,

**AMENDED ANSWER TO
COMPLAINT**

vs.

STATE OF HAWAII, CITY
AND COUNTY OF HONOLULU,
HAROLD Y. SHINTAKU, SANDRA
ALEXANDER, KEN T. KUNYUKI,
ARNOLD B. - GOLDEN, -
LAWRENCE A. GOYA,

Defendants.

FILED

1982 DEC 22 AM 8:12

**B CHO
CLERK**

AMENDED ANSWER TO COMPLAINT

Come now Defendants Harold Y. Shintaku, Arnold B. Golden and the State of Hawaii, by and through their attorneys, Tany S. Hong, Attorney General, State of Ha-

waii, and Russell A. Suzuki, Deputy Attorney General, and for amended answer to the complaint filed herein answer as follows:

FIRST DEFENSE

(Admissions and Denials)

The defendants answer the allegations contained in the complaint as follows:

1) Defendants admit to the allegations contained in paragraph 1.

2) Defendants admit to the allegations contained in paragraph 2 as to defendants Harold Y. Shintaku and Dr. Arnold B. Golden but are without knowledge or information sufficient to form a belief as to the truth of the allegations relating to the other defendants and, therefore, deny these allegations.

3) Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 and, therefore, deny these allegations.

4) Defendants admit to the allegations contained in paragraph 4.

5) Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 5 and, therefore, deny these allegations.

6) Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 6 and 7 and, therefore, deny these allegations.

7) Defendants deny the allegations contained in paragraphs 8, 9 and 10.

8) As to Count II, defendants reallege the answers to paragraphs 1 through 10 as if fully stated herein.

9) Defendants deny the allegations contained in paragraph 12 and 13.

10) Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 14 and, therefore, deny these allegations.

11) Defendants deny the allegations contained in paragraph 15.

12) As to Count III, defendants reallege the answers to paragraphs 1 through 15 as if fully stated herein.

13) Defendants deny the allegations contained in paragraphs 17, 18, 19, 20, 21, 22, and 23.

14) As to Count IV, defendants reallege the answers to paragraphs 1 through 23 as if fully stated herein.

15) Defendants deny the allegations contained in paragraphs 25 and 26.

16) As to Count V, defendants reallege the answers to paragraphs 1 through 26 as if fully stated herein.

17) Defendants deny the allegations contained in paragraphs 28, 29, and 30.

18) As to Count VI, defendants reallege the answer to paragraph 1 through 30 as if fully stated herein.

19) Defendants deny the allegations contained in paragraphs 32, 33, and 34.

20) As to Count VII, defendants reallege the answers to paragraphs 1 through 35 as if fully stated herein.

21) Defendants deny the allegations contained in paragraphs 36 and 37.

22) Defendants admit to the allegations contained in paragraph 38.

23) Defendants deny the allegations contained in paragraphs 39, 40, 41, 42, 43, and 44.

24) As to Count VIII, defendants reallege the answers to paragraphs 1 through 44 as if fully stated herein.

25) Defendants deny the allegation contained in paragraphs 46 and 47.

26) As to Count IX, defendants reallege the answers to paragraphs 1 through 47 as if fully stated herein.

27) Defendants deny the allegations contained in paragraph 49.

28) Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 50 and 51 and, therefore, deny these allegations.

29) Defendants deny the allegations contained in paragraphs 52, 53, and 54.

30) As to Count X, defendants reallege the answers to paragraphs 1 through 54 as if fully stated herein.

31) Defendants deny the allegations contained in paragraphs 56, 57, 58, 59, and 60.

32) As to Count XI, defendants reallege the answers to paragraphs 1 through 60 as if fully stated herein.

33) Defendants deny the allegations contained in paragraphs 62, 63, and 64.

34) As to Count XII, defendants reallege the answers to paragraphs 1 through 64 as if fully stated herein.

35) Defendants deny the allegations contained in paragraphs 66, 67, 68, 69, and 70.

36) As to Count XIII, defendants reallege the answers to paragraphs 1 through 70 as if fully stated herein.

37) Defendants deny the allegations contained in paragraphs 72, 73, and 74.

38) As to Count XIV, defendants reallege the answers to paragraphs 1 through 74 as if fully stated herein.

39) Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 76, 77 and 78, and, therefore, deny these allegations.

40) Defendants deny the allegations contained in paragraph 79.

41) Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 80, and, therefore, deny these allegations.

42) Defendants deny the allegations contained in paragraphs 81 and 82.

43) As to Count XV, defendants reallege the answers to paragraphs 1 through 82 as if fully stated herein.

44) Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 84, and, therefore, deny these allegations.

45) Defendants deny the allegations contained in paragraphs 85 and 86.

46) As to Count XVI, defendants reallege the answers to paragraphs 1 through 86 as if fully stated herein.

47) Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 88 and 89, and, therefore, deny these allegations.

48) Defendants deny the allegations contained in paragraphs 90, 91, and 92.

49) As to Count XVII, defendants reallege the answers to paragraphs 1 through 92 as if fully stated herein.

50) Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 94, 95, and 96, and, therefore, deny these allegations.

51) Defendants deny the allegations contained in paragraphs 97 and 98.

52) As to Count XVIII, defendants reallege the answers to paragraphs 1 through 98 as if fully stated herein.

53) Defendants deny the allegations contained in paragraphs 100 and 101.

54) Any allegation not specifically answered is denied.

SECOND DEFENSE

(Failure to State a Claim)

55) Plaintiff has failed to state a claim against defendants upon which relief can be granted.

THIRD DEFENSE

56) Defendant Harold Y. Shintaku alleges that he has not been personally and properly served with a complaint herein.

FOURTH DEFENSE

57) Defendants allege that Judicial Immunity bars this action.

FIFTH DEFENSE

58) Defendants allege that the statute of limitations bars this action.

SIXTH DEFENSE

59) Defendants allege that the doctrine of waiver bars this action.

SEVENTH DEFENSE

60) Defendants allege that the doctrine of laches bars this action.

EIGHTH DEFENSE

61) Defendants allege that the doctrine of estoppel bars this action.

NINTH DEFENSE

62) Defendants allege that the doctrine of unclean hands bars this action.

TENTH DEFENSE

63) Defendants allege that they each acted within the authority of their position.

ELEVENTH DEFENSE

64) Defendants allege that the doctrine of sovereign immunity bars this action.

TWELFTH DEFENSE

65) Defendant Arnold B. Golden alleges that he acted pursuant to a valid court order.

WHEREFORE, defendants pray that:

a) The Complaint against defendants be dismissed with prejudice.

b) Defendants be awarded costs and reasonable attorney's fees.

c) This Court grant such further and other relief as it deems just and equitable.

DATED: Honolulu, Hawaii, December 22, 1982.

/s/ RUSSELL A. SUZUKI
RUSSELL A. SUZUKI
Deputy Attorney General

Attorney for Defendants
State of Hawaii, Arnold B.
Golden and Harold Y. Shintaku

APPENDIX R

TANY S. HONG 821
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Attorneys for Defendants
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Shintaku, Arnold B. Golden
and Lawrence A. Goya

1st CIRCUIT COURT
STATE OF HAWAII
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CLERK

**IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII**

DONALD D. COWAN,

CIVIL NO. 71638

Plaintiff,

vs.

STATE OF HAWAII, CITY AND
COUNTY OF HONOLULU,
HAROLD Y. SHINTAKU, SANDRA
ALEXANDER, KEN T. KUNTYUKI,
ARNOLD - B. GOLDEN,
LAWRENCE A. GOYA,

Defendants.

MOTION TO DISMISS COM-
PLAINT OR ALTERNA-
TIVELY FOR SUMMARY
JUDGMENT AS AGAINST
DEFENDANTS STATE OF
HAWAII, HAROLD Y. SHIN-
TAKU, ARNOLD B. GOLDEN
AND LAWRENCE A. GOYA;
MEMORANDUM IN SUP-
PORT OF MOTION; AFFIDA-
VIT OF RUSSELL A.
SUZUKI; EXHIBIT "A"; NO-
TICE OF MOTION

**MOTION TO DISMISS COMPLAINT OR
ALTERNATIVELY FOR SUMMARY JUDGMENT AS
AGAINST DEFENDANTS STATE OF HAWAII
HAROLD Y. SHINTAKU, ARNOLD B. GOLDEN
AND LAWRENCE A. GOYA**

Come now Defendants, State of Hawaii, Harold Y. Shintaku, Arnold B. Golden, and Lawrence A. Goya, by and through their attorneys, Tany S. Hong, Attorney General, State of Hawaii, and Russell A. Suzuki, Deputy Attorney General, and hereby move this Honorable Court for an order dismissing the complaint filed by Plaintiff Donald D. Cowan herein for failure to state a cause of action upon which relief can be granted or alternatively for summary judgment on the basis that there are no issues of material fact and defendants are entitled to judgment as a matter of law.

This motion is made pursuant to Rules 12(b)(6), 12(c), 41(b) and 56 of the Hawaii Rules of Civil Procedure, the memorandum in support of this motion attached hereto, the affidavit attached hereto and the records and files herein.

DATED: Honolulu, Hawaii, January 13, 1983.

/s/ RUSSELL A. SUZUKI
RUSSELL A. SUZUKI
Deputy Attorney General

Attorney for Defendants
State of Hawaii, Harold Y.
Shintaku, Arnold B. Golden
and Lawrence A. Goya

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

DONALD D. COWAN,

CIVIL NO. 71638

Plaintiff

MEMORANDUM IN SUP-
PORT OF MOTION

vs.

STATE OF HAWAII, CITY AND
COUNTY OF HONOLULU,
HAROLD Y. SHINTAKU, SANDRA
ALEXANDER, KEN T. KUNIYUKI,
ARNOLD B. GOLDEN,
LAWRENCE A. GOYA,

Defendants.

MEMORANDUM IN SUPPORT OF MOTION

I. PRELIMINARY STATEMENT

By complaint filed June 7, 1982, Plaintiff Donald D. Cowan (hereinafter referred to as Plaintiff), filed this action against defendants State of Hawaii, Harold Y. Shintaku, Arnold B. Golden and Lawrence A. Goya, among others, seeking damages for injuries he allegedly suffered as a result of judicial proceedings held against him for contempt of court and also for proceedings pursuant to a charge of assault in the third degree.

Because of the length of Plaintiff's complaint, a summary of the circumstances upon which this present action is premised, it is believed, would be helpful to this Court in deciding this motion.

On April 5, 1979, Jeanette Spoone, Plaintiff's former girlfriend, filed a civil action against Plaintiff seeking damages for harassment and assault and battery. (*Spoone v. Cowan*, Civil No. 57584, Circuit Court of the First Circuit, State of Hawaii.) Said action was presided over by the Honorable Harold Y. Shintaku, defendant herein, and a

judge of the Circuit Court, State of Hawaii. In pursuing said action, Jeanette Spoone sought and was granted a temporary restraining order dated April 11, 1979, ordering Plaintiff to refrain from writing letters to Ms. Spoone, to refrain from following her or her family, to refrain from bothering or harassing her, to refrain from using Kawaihae Street and to refrain from telephoning her. Said Temporary Restraining Order was subsequently adopted into a Stipulation To Enter Into Judgment Of Permanent Injunction which was signed by Plaintiff and filed on May 15, 1979.

Plaintiff did not obey the injunction against him and was, therefore, subsequently found to be in contempt of court. Plaintiff was thereupon placed in the custody of the Director of the Department of Social Services and Housing for imprisonment in the Halawa Correctional Facility for a period of six months. As a further order of the Court, Plaintiff was ordered to submit himself to the custody of the Department of Social Services and Housing for psychiatric examination during the term of his imprisonment. (See Exhibit "A", attached hereto and made a part hereof.) Defendant Arnold B. Golden, a psychiatrist employed by the State of Hawaii, performed said examination pursuant to said order.

In addition to the civil action against Plaintiff, Plaintiff was also a defendant in criminal actions for Assault In The Third Degree and for Harassment. Said charges were premised upon the same circumstances that have rise to the civil action.

Defendant Lawrence A. Goya, as a Deputy Public Defender appointed to represent Plaintiff in the criminal actions, filed a Motion For Mental Examination of Defendant pursuant to Hawaii Revised Statutes, Section 704-404. Said motion was granted and Plaintiff was examined by a panel of two psychiatrists and a psychologist. Plaintiff was de-

terminated to be fit to stand trial and on or about July 10, 1980, he was convicted of Assault In The Third Degree.

Plaintiff thereafter dismissed the Public Defenders Office as his counsel and sought a trial de novo based on the ground that he was not informed of his right to a jury trial. A trial do novo was granted and Plaintiff, representing himself pro se, successfully defended himself of the charge and was acquitted.

In Plaintiff's complaint before this court, he has alleged injuries as a result of the actions of defendant Harold Y. Shintaku as a judge of the Circuit Court of the State of Hawaii, defendant Arnold B. Golden as a state psychiatrist and witness, defendant Lawrence A. Goya as a Deputy Public Defender, and defendant State of Hawaii as respondent superior of said defendants.

For the reasons discussed, *infra*, defendants State of Hawaii, Harold Y. Shintaku, Arnold B. Golden and Lawrence A. Goya believe that the allegations fail to state a claim upon which relief can be granted and that there are no issues of material fact and, therefore, they are entitled to an order dismissing Plaintiff's cause of action against them.

II. ARGUMENTS

A. The Doctrine of Absolute Judicial Immunity Bars Plaintiff's Cause of Action.

1. Judges

Judges performing their judicial duties are accorded absolute immunity from suit. The United States Supreme Court in holding that the president of the United States has absolute immunity in *Nixon v. Fitzgerald*, 50 U.S.L.W. 4797 (1982) also stated at p. 4801 that:

... the decision in *Pierson v. Ray*, 386 U.S. 547, 18 L.Ed.2d 288 (1967), involving a 1983 suit against a state judge, recognized the continued

validity of the absolute immunity of judges for acts within the judicial role. This was a doctrine "not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." *Id.* at 554, quoting, *Scott v. Stansfield*, L.R. 3 Ex. 220, 223 (1868).

In *Mirin v. The Justices of the Supreme Court of Nevada, et al.*, 415 F.Supp. 1178 (D. Nevada 1976), involving an action against the Justices at the Nevada Supreme Court, among others, for declaratory and injunctive relief, the Court held, *inter alia*, that judges were immune with respect to a request for injunctive relief relating to the performance of judicial duties.

The Court stated in relevant part:

It is to be noted that, while *Bradley* involved a suit for damages, judicial immunity was held by the Supreme Court to apply to *all* civil actions. So also did the Supreme Court hold in *Pierson v. Ray* 386 U.S. 547, 554, 87 S.Ct. 1213, 1218, 18 L.Ed.2d 288, 294 (1967), again involving a suit for damages but supporting judicial immunity against *all* civil actions, including actions brought under 42 U.S.C. 1983. (Civil Rights actions; whether "an action at law [damages], suit in equity [injunctive or declaratory relief], or other proper proceedings for redress.")

It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges

would contribute not to a principled and fearless decision making but to intimidation.

In *Jordan v. Hawaii Government Employees' Association*, 472 F.Supp. 1123 (U.S.D.C. Hawaii 1979), the Court in granting a motion for summary judgment, held that judicial officials are not liable to civil action for their judicial acts, even if such acts are in excess of jurisdiction and are alleged to have been done maliciously or corruptly. The Court, citing to *Pierson v. Ray* (*supra*), *Butz v. Economon*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978) and *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), concluded that absolute immunity is necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation.

Thus, the absolute immunity of judges, in their judicial functions, now is well settled. *Harlow v. Fitzgerald*, 50 U.S.L.W. 4815 (1982). In the present action defendant Judge Harold Y. Shintaku acted within his judicial role and his actions were made pursuant to a complaint properly before his court. As such, he is accorded absolute immunity.

2. Psychiatrist

Defendant Arnold B. Golden is accorded absolute immunity as a witness and for actions committed pursuant to a court order. Plaintiff's allegations against defendant Arnold B. Golden derive from Golden's participation as a witness to the court proceedings against Plaintiff and as the psychiatrist who examined Plaintiff while he was committed to the Halawa Correctional Facility.

Under either role, defendant Golden is protected from suit on the basis of absolute judicial immunity.

In *Myers v. Bull*, 599 F.2d 863 (C.A. 8th Cir. 1979) the issue of witness immunity from civil suits arising from their testimony in judicial proceedings was address.

The Court, in upholding a lower court's holding that a witness should be immune from civil rights suits alleging perjurious testimony noted at p. 866:

Without engaging in an unduly detailed discussion of the history of the common law rule granting absolute immunity to witnesses, we agree that the majority position is correct and that witnesses should be immune from civil rights suits alleging perjurious testimony. In *Imbler v. Pachtman*, 424 U.S. 409. 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), the Supreme Court held prosecutors immune from civil rights suits based on acts taken in the course of their duties. In so holding, the Court stressed the need for full disclosure of relevant evidence to the jury and noted that a prosecutor might be reluctant to call witnesses if he would be subject to civil suit based on the allegation that he knew or should have known that they were testifying falsely. *Id.* at 426, 96 S.Ct. 984. A similar rationale would apply to witnesses who might be reluctant to give their version of the case if faced with the possibility of civil suit if their testimony is disbelieved by the trier of fact.

The court, therein, recognized the rule of witness immunity as being co-extensive with the immunity of other participants at trial, i.e. judges and prosecutors. Similarly, *O'Connor v. State of Nevada*, 686 F.2d 749 (U.S.C.A. 9th Cir., 1982) and *Jordan, supra*, conforms such a conclusion.

In *Slotnick v. Garfinkle*, 632 F.2d 163 (U.S.C.A. 1st Cir., 1980), the Court, citing *Fowler v. Alexander*, 478 F.2d 694, 696 (U.S.C.A. 4th Cir., 1973) which held that a sheriff and jailer confining a plaintiff in execution of a court order is absolutely immune from suit, held that judicial immunity extends as well to those who carry out the orders of judges.

Additionally, the Court in *Slotnick* held that allegations of conspiracy must be supported by material facts, not merely conclusory statements.

In the case at bar, the Court Order of December 18, 1979 issued by Judge Harold Y. Shintaku in *Spoone v. Cowan*, Civil No. 57584 provided, in part, the following:

(4) That Defendant Donald D. Cowan submit himself to the custody of the Department of Social Services and Housing for psychiatric examination during the term of imprisonment. (See Exhibit "A" attached.)

Defendant Golden's actions, therefore, were all done pursuant to carrying out the official directives of a judge. As such, he is absolutely immune from Plaintiff's suit.

In *Burkes v. Callion*, 433 F.2d 318 (U.S.C.A. 9th Cir. 1970), it was held that court-appointed psychiatrists who prepared and submitted medical reports to state court were immune from liability under Civil rights Act section pertaining to civil action for deprivation of rights on the ground that they had made false statements of fact and omitted material facts in their reports to state court in criminal case. See also *Franklin v. State of Oregon, State Welfare Division*, 662 F.2d 1337 (U.S.C.A. 9th Cir. 1981).

The Court in *Burke*, in upholding a lower court's granting of absolute immunity for a probation office and court-appointed psychiatrist stated at p. 319:

We hold that the court-appointed psychiatrist who prepared and submitted medical reports to the state court are also immune from liability for damages under the Act.¹ The function of the examining psychiatrists in this case falls within the scope of "quasi-judicial immunity," defined by this court in *Robinchaud v. Ronan*, 351 F.2d 533, 536 (9th Cir. 1965),

¹ 42 U.S.C.A., § 1983.

to extend to acts committed "in the performance of an integral part of the judicial process."

[MATERIAL DELETED IN PRINTING]

B. The Statute of Limitations Further Bars This Action Against Defendants.

Plaintiff filed his complaint on or about June 7, 1982. Except for Counts XVII and XVIII, the allegations alleged in the complaint are premised upon actions taken prior to April 8, 1980, the date that defendant Goya filed the Motion For Mental Examination of defendant. Accordingly, Plaintiff's action was not commenced within the two years statute of limitations pursuant to H.R.S. Section 662-4, 657-7, or 657-4.

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III. CONCLUSION

On the basis of the foregoing points and authorities, and other arguments, authorities and evidence as may be adduced at the hearing on this motion, the defendants herein respectfully request this Honorable Court to grant its motion.

DATED: Honolulu, Hawaii, January 13, 1983.

Respectfully submitted,
/s/ RUSSELL A. SUZUKI
RUSSELL A. SUZUKI
Deputy Attorney General
Attorney for Defendants
State of Hawaii, Harold Y.
Shintaku, Arnold B. Golden
and Lawrence A. Goya

EXHIBIT A

Of Counsel:

KUNIYUKI & PANG

KEN T. KUNIYUKI 1321
309 James Campbell Bldg.
828 Fort Street Mall
Honolulu, Hawaii 96813
Telephone No. 521-2388

Attorney for Plaintiff

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

JEANETTE SPOONE,

Civil No. 57584

Plaintiff,

JUDGMENT

vs.

DONALD D. COWAN, also
known as DOUG COWAN,

Defendant.

1st CIRCUIT COURT
STATE OF HAWAII

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/s/ S. IKEDA
CLERK

JUDGMENT

This cause came on to be heard on the Motion of Plaintiff JEANETTE SPOONE for a judgment in contempt against Defendant DONALD D. COWAN, also known as DOUG COWAN and the Court having considered the motion, the records and files herein, and oral argument:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That Defendant DONALD D. COWAN is in contempt of this Court for having failed and refused to obey its Order of August 8, 1979;

2. That Defendant DONALD D. COWAN is hereby committed to the custody of the Director of the Department of Social Services and Housing or his authorized representative for imprisonment in the Halawa Correctional Facility, State of Hawaii, for a period of six (6) months, commencing as of December 11, 1979;

3. That Defendant DONALD D. COWAN pay a fine of FIVE HUNDRED AND NO/100 (\$500.00); and

4. That Defendant DONALD D. COWAN submit himself to the custody of the Department of Social Services and Housing for psychiatric examination during the term of imprisonment.

DATED: Honolulu, Hawaii, Dec 13 1979.

/s/ HAROLD Y. SHINTAKU

Judge of the above-entitled Court

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APPENDIX S

DONALD D. COWAN
250 S. Hotel Street, #4060
Honolulu, Hawaii 96813
Tel. No. 524-5600

Plaintiff Pro Se

**IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII**

DONALD D. COWAN,

Plaintiff,

vs.

CIVIL NO. 71638

AFFIDAVIT OF DONALD D.
COWAN; EXHIBITS "1"
THROUGH "34"

STATE OF HAWAII, CITY AND
COUNTY OF HONOLULU,
HAROLD Y. SHINTAKU, SANDRA
ALEXANDER, KENT T.
KUNIYUKI ARNOLD B.
GOLDEN, LAWRENCE A.
GOYA,

Defendants.

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AFFIDAVIT OF DONALD D. COWAN

STATE OF HAWAII)	
)	
CITY AND COUNTY OF)	SS.
HONOLULU)	

DONALD D. COWAN, being first duly sworn on oath,
deposes and says:

1. That your Affiant is the Plaintiff in the above-cap-
tioned case.

2. That your Affiant, after finishing six months of imprisonment on June 5, 1980, on or about July, 1980, telephoned Court Reporter Kawiika Maano and asked him if he could purchase copies of the transcripts of the February 5, 1980 Civil No. 57584 proceedings from him, and Court Reporter Kawiika Maano replied, to the best of your Affiant's recollection, "No. I don't think Judge Shintaku wants you to pursue this matter." Your Affiant at the time was without legal knowledge to know how to get around Mr. Maano's refusal to sell the transcripts, and so did not pursue the matter further.

3. That your Affiant is presently without funds sufficient to pay for the transcripts of the Civil No. 57584 proceedings, and therefore relies herein only on the Civil Trial Calendar minutes and records of Civil No. 57584 for exhibits.

4. In mid-1979 your Affiant was telephoned by Jeanette Spoone and asked to go to a Hawaii Kai Singles Club party with her. Your Affiant went to the party, but found out that Jeanette Spoone's former husband, Sam Spoone, was there also. The former husband's car was in front of the party house for the duration of the party, but he was nowhere to be seen. More to be said on that herein.

5. That after the party your Affiant went to Spoone's residence, and from there they went for a walk and talk on the beach. That the next day your Affiant was informed by Jeanette Spoone that her former husband, Sam Spoone, had driven by several times, and then called her in the morning complaining that she had been gone all night.

6. That on subsequent days Sam Spoone called Jeanette Spoone several times during the evenings while your Affiant was visiting Jeanette.

7. That your Affiant and Jeanette began to become romantically [sic] involved soon after which lasted for about three months.

8. That Jeanette Spoone informed your Affiant towards the end of the relationship that Sam Spoone had told her he had trespassed onto her property and watched she and your Affiant through her front screen door while they were "making out" on the couch.

9. That Jeanette Spoone told your Affiant that Sam Spoone had been very violent, and had once held a gun to her head. On another occasion, Jeanette said that Sam Spoone had driven his car through their garage wall into her living room.

10. That Jeanette Spoone continued to complain about Sam Spoone many times, that he was jealous and possessive and that he repeatedly drove past her house and telephoned her; your Affiant observed Sam Spoone in fact so repeatedly driving by, and listened numerous times to Jeanette Spoone answering the phone and talking to Sam during the course of his visitation with Jeanette, sometimes the calls being as many as three and four times in a single evening.

11. That your Affiant took Jeanette Spoone to an EST meeting on world-hunger, and when they returned at 11:00 p.m. that night, Sam Spoone was waiting on her front porch. That your Affiant was instructed by Jeanette Spoone to drive on, and not stop. That some ways down the road your Affiant observed high-speed Mercedes following him, who then ran off to the side of the road on the right, passenger side of your Affiant's car so as to yell at Jeanette Spoone, and then slowed, sped past the left side of your Affiant's car and swerved in front of your Affiant's car so as to run it off the road; that Jeanette Spoone said to your Affiant, "I better get out and talk with him before he gets wild," and Jeanette Spoone got out of your Affiant's car and into Sam Spoone's car. Your Affiant did not attempt to violently confront Sam Spoone on that evening or any other time; that your Affiant followed Jeanette and Sam Spoone to her home, and observed

loud arguing, and then they drove to Sam's house, and your Affiant stayed behind to talk with and comfort Jeanette Spoone's son, Mark.

12. That later, Jeanette Spoone had agreed to have your Affiant visit her one evening, and that your Affiant discovered that just prior to his 8:00 p.m. visit that Sam Spoone had taken Jeanette Spoone to dinner and driven her home shortly before your Affiant arrived; that your Affiant observed Jeanette Spoone was severely depressed. About two hours later, your Affiant smelled smoke, and together your Affiant and Jeanette Spoone went outside and observed a larger brush fire directly across the street from Jeanette Spoone's residence. Fire engines were called and needed to put out the brush fire. Your Affiant could not have set that fire because he was with Jeanette Spoone who is his alibi.

13. That shortly after these several events your Affiant decided that he did not want to continue a very mixed up (and possibly dangerous) relationship with Jeanette Spoone and Sam Spoone, and so informed Jeanette. Incidentally, Jeanette Spoone and Sam Spoone had been divorced about two years before your Affiant met Jeanette Spoone, and they were separated as well as divorced, but living only a few blocks away from each other.

14. That on the last occasion your Affiant had of seeing Jeanette Spoone, on the day he informed her it did not seem to be good for him to continue dating her, she became angry, and asked your Affiant to leave. That your Affiant left willingly, but in leaving realized that he had left his watch behind—being informed by Jeanette's son Mark that it was in his possession. Jeanette Spoone promised to deliver the watch to your Affiant's home address, and said she was tired and upset, and your Affiant left without retrieving his watch, trusting Jeanette Spoone to return it as she promised.

15. That a dispute with Jeanette Spooone began with her subsequent, deliberate withholding of his watch from him as petty revenge for whatever feelings of anger and resentment Jeanette Spooone harbored against him.

16. That after waiting with extraordinary patience, for about two months, calling her twice about the watch in the two months, for her promised return of the watch to him, your Affiant decided it was necessary to visit Spooone in person and ask if she would see if she could find the watch, so that your Affiant would have a definite answer as to whether the watch could be found or not, so that he could make an intelligent decision as to whether to spend the money for a new watch or not; it has been suggested that your Affiant went back to visit Spooone with the secret, unspoken motivation of attempting to re-establish a romantic relationship with her. This is sheer fabrication. Your Affiant made it clear to Jeanette Spooone that she had his good wishes in re-marrying Sam Spooone, and later in establishing a romantic relationship and marrying a new boyfriend sometime later in this dispute, Isaac William Ellison.

17. When your Affiant was invited into her house by her son Mark, at the time of the visit to retrieve his watch or firm word it could not be found, Spooone appeared and apparently had the mistaken notion that your Affiant had the intention of demanding payment for the watch, which was an utterly untrue notion created in her own mind, and she shouted, "I'm never going to give you your watch back," and charged towards your Affiant and shoved him, and told her son to call the police. Your Affiant had been very, very passive in this meeting, doing everything with his lowered voice and body language to convey his passivity to Jeanette Spooone. However, after being shoved backwards by Spooone out the doorway, your Affiant felt annoyance enough when he heard Spooone tell her son to call the police that he waited on the property for the sole purpose of seeing if Jeanette Spooone would actually do

this unbelievable thing of calling the police. The police shortly after arrived, and the beginning of a feud began, though on that evening your Affiant simply quietly left after giving the police his name. (Exhibit "27", page 24, lines 3-20)

18. Your Affiant was annoyed and bewildered, but had no desire to exact revenge of any kind upon Jeanette Spoone. But annoyed and upset, however, the next day he drove down Spoone's street on the way to another destination, and Jeanette Spoone and her son were in their driveway, who saw your Affiant driving by and "gave the finger to" your Affiant. Your Affiant then decided to turn around a ways up the street, park his car and read a book, obviously resisting Spoone's giving him the finger.

19. Spoone then called her former husband up to "defend" her, and her former husband drove over, got out, opened your Affiant's car door, and began assaulting your Affiant, and Affiant refused to fight back, merely having his shirt ripped open in the front. When your Affiant wouldn't get out of the car and fight, Spoone called the police, and the police came next and subjected your Affiant to considerable harassment, i.e., repeated searches of his person, walking into his person so as to shove him backwards with their body insulting your Affiant verbally, obviously attempting to stimulate your Affiant into responding physically so as to give them a sham excuse to arrest your Affiant.

20. Your Affiant eventually drove away, extremely angered at the police in particular for their treatment of him, particularly in the circumstance that Spoone had given the finger to your Affiant to stimulate his anger, and then called the police to "defend" her.

21. A dispute then began over your Affiant's right to peaceably drive on Spoone's street, with Spoone's son, and his friends, disputing by throwing rocks, eggs and other objects at and striking your Affiant whenever they saw

him drive by. Your Affiant's resentment grew, and he began the practice of simply coming to a halt and parking whenever someone "violated his rights" to a peaceable passage on Spoone's street. Your Affiant absolutely refused to partake of the violence, one time being struck with a rock, and driving up to the person who threw it and handing him the rock and asking him to please not do it again. Another time, your Affiant allowed his attackers to punch him, kick him, spit in his face, hit him with sticks, and at all times your Affiant refused to be violent back.

22. On one occasion near the beginning of this dispute, your Affiant gave an envelope with cash in the amount of twice the price of the watch, along with a bouquet of flowers and a gift for her son; Jeanette Spoone's reaction was to call the police upon your Affiant was waiting some ways down the road from her house.

23. Eventually, Spoone got a new boyfriend, about 6'6" tall, and on one occasion when your Affiant parked on the street, on March 28, 1979, Spoone exited her home with the new boyfriend, heaved a rock at your Affiant, and the 6'6" or so boyfriend took after your Affiant, chasing him down the street. Your Affiant did not attempt to fight, but ran to avoid all contact. When the new boyfriend could not catch your Affiant, Spoone called the boyfriend back to your Affiant's Vespa motorscooter, and hollared [sic] out so as your Affiant could plainly hear, "Let's push it [your Affiant's Vespa motorscooter] into the ditch." Your Affiant realized that the scenario was to threaten his vehicle so as to cause your Affiant to come back to the proximity of the 6'6" boyfriend, compensating for his inability to catch your Affiant in a footrace, so that the 6'6" boyfriend could grab your Affiant and beat him up.

24. Your Affiant then watched Spoone push over his vehicle, but he refused to come near Spoone, Ellison and his Vespa for the threat of that relatively minor damage.

Then the boyfriend righted the Vespa and began pushing it down the road, towards the very deep, concrete-bottomed ditch, thus threatening the Vespa with probable irreparable "total" damage. Your Affiant began to panic, called out several times to them that he could not let them do this, and finally made the decision to strike the 6'6" boyfriend. When he approached, however, the boyfriend let go of the Vespa and renewed chasing your Affiant, making contact with your Affiant and nearly catching him. The boyfriend tried baiting and catching your Affiant twice this way, and then the third time ignored your Affiant's approach towards him and he and Spooone began pushing the Vespa further down the road, very rapidly, toward the concrete-bottomed ditch, in what seemed to your Affiant to be a decision by the boyfriend and Spooone to forget trying to catch your Affiant and simply shove the Vespa motorscooter into the concrete-bottomed ditch.

25. Your Affiant at this time made the decision that he would have to strike the 6'6" boyfriend very hard in the face, from the side across the width of the Vespa, but when he approached the Vespa he realized his arm-reach was not long enough to reach across the Vespa's front mirrors to strike the boyfriend. When your Affiant realized he could not reach far enough to strike the boyfriend hard enough to stop him, and not wanting to risk going around to the other side and engaging him in a wrestling match since the boyfriend outweighed your Affiant by probably 100 pounds, your Affiant made the panicky decision to strike Spooone instead, in order to stop the rapid pushing of his Vespa towards that concrete-bottomed ditch.

26. Your Affiant attempted to punch Spooone lightly in the forehead (she was bent forward at the waist pushing the Vespa), in his panic not thinking of merely slapping her in the face, but she moved her head and the fairly soft punch landed on the corner of her forehead, and she received a black eye. Your Affiant is told that she also suffered a slight fracture, but your Affiant has never seen

any medical report evidence as to the truth of this. In any case, your Affiant backed about 15 or 20 feet away from the boyfriend and Spoone, and Spoone, who in no case was knocked even so much as off balance, was holding her forehead. Her boyfriend asked her, "Are you all right," and Jeanette Spoone replied, "Yes. Get him." The boyfriend and a neighbor then began chasing your Affiant around the street, and the neighbor, who was chasing your Affiant with a walking cane, struck your Affiant with the cane and badly wounded his right forearm just below the elbow, and fractured the right forearm. Soon after a passerby stopped, and prevented further pursuit of your Affiant and then called the police.

27. Spoone told police that she and her boyfriend had gone out merely to talk to your Affiant, and that your Affiant had suddenly, "out of nowhere," struck Spoone; this version told to police has subsequently been shown to have been perjury by her own inconsistent statements made under oath.

28. An ambulance was called for your Affiant, and your Affiant's arm wound was closed, and your Affiant taken by a friend to Queen's Emergency for sutures to be applied, and a cast put on his arm.

29. Because your Affiant could not drive his Vespa safely, he and a friend of his parked the Vespa about two blocks away, on a side street, from where the incident occurred, and the friend then drove your Affiant to Queen's Emergency. The next day, your Affiant went to find the Vespa, and it was nowhere to be seen—except that pieces of plastic and cushion foam from the Vespa seat and a few bits of broken plastic were found in the spot where it had been parked. A couple of days later, the police called your Affiant and informed him that the Vespa had been pulled out of Koko Marina Bay by a towtruck, where the Vespa had been sitting underwater in the saltwater bay a couple of days. The Vespa was utterly destroyed beyond

any practical cost of repair, an estimate being given that repair would cost far more than a new Vespa. Your Affiant, without any means to buy a new Vespa, and only with minimum no-fault insurance, was required to spend about three months tearing down the Vespa, sanding it inside and out and repainting it, tearing apart the engine and electronics and suspension system, and rebuilding it with new, non-corroded parts.

30. An attorney friend of a friend of Spooone's filed a complaint for an injunction against your Affiant on the alleged ground that he had assaulted Spooone without provocation when she had merely gone out to speak to your Affiant. Your Affiant, without counsel, attempted to defend himself, and typed an answer to the Complaint as required on the Summons. A hearing for the injunction was held by Judge Arthur Fong. At the hearing, Spooone told essentially the same story that she had told to police, i.e., that she went to talk with your Affiant, had suddenly struck her. Your Affiant then told the same story that is related in this affidavit. Judge Fong then said, "There are two different stories here", and he set a hearing date for a permanent injunction.

31. Your Affiant, while preparing for the hearing, was suffering from a fractured arm in a cast, severe depression, and was faced with the immediate problem of fixing his only transportation immediately before too much corrosion set in, or lose it forever. Your Affiant was without transportation to go and seek legal help, and was suffering a great amount of pain, and therefore he called attorney Roney and agreed to sign an injunction without a hearing.

32. Attorney Roney then drafted the injunction and your Affiant went to his office. Your Affiant was surprised that there was a "findings of fact" involved, as his impression was he was simply going to agree to sign an "agreement" or "contract" without a hearing. He objected upon reading the Findings of Fact to Roney that the Findings of Fact

were false in very large part and he expressed reluctance to sign. Roney then reminded your Affiant, "you remember what Judge Fong was like. I talked to him and he said he might not let you stipulate." Your Affiant, remembering Judge Fong's harsh demeanor, and fearing that Roney meant Judge Fong might impose some unstated severe penalty upon your Affiant, signed the stipulation.

33. Your Affiant did not anticipate the trouble that could be caused by the breadth of signing an order "not to follow" Spoone, nor the set up that could be caused by an injunction against telephoning Spoone.

34. Subsequently, on July 23, 1979, your Affiant was summoned as a defendant in Civil No. 57584 to Judge Shintaku's court to show why he should not be held in contempt of the injunction;

[MATERIAL DELETED IN PRINTING]

151. FURTHER AFFIANT SAYETH NAUGHT.

DATED: Honolulu, Hawaii, February 24, 1983.

/s/Donald D. Cowan
DONALD D. COWAN
Plaintiff Pro Se

Subscribed and sworn to before me
this 24 day of February, 1983.

/s/ Valerie Schweigart
Notary Public, First Judicial
Circuit, State of Hawaii

My Commission Expires:3/4/85

EXHIBIT 1

CIVIL TRIAL CALENDAR

FRIDAY, JULY 27, 1979

HONORABLE HAROLD Y. SHINTAKU, JUDGE, SEVENTH
DIVISION, PRESIDING

195a

COURT CLERK: MERLE MOTOKANE
COURT REPORTER: PRISCILLA McCOY
BAILIFF: PETER UEHARA

10:00 a.m.

CIVIL NO. 57584

JEANETTE SPOONE,

KEN T. KUNIYUKI

Plaintiff,

for Plaintiff

vs.

DONALD D. COWAN,
also known as DOUG COWAN,

Pro Se

Defendant.

MOTION FOR ORDER TO SHOW CAUSE

MINUTES:

(Prior to convening PLAINTIFF'S EXHIBITS 1 to 4 MARKED FOR IDENTIFICATION: 1 - 7 page Letter dated July 4, 1979 (Doug Cowan to Jack); 2 - 4 page Letter dated June 30, 1979 (Doug Cowan to Mr. Roney); 3 - Postcard to Ms. Jeanie Spoone from Doug Cowan; 4 - Postcard to Jeanie Spoone from Doug.)

10:00 a.m. COURT CONVENED.

Court inquired of Mr. Cowan if he was representing himself and Mr. Cowan stated that he was.

10:09 a.m. JOHN A. RONEY duly sworn, attorney who previously represented plaintiff.

Direct examination by Mr. Kuniyuki.

10:10 a.m. PLAINTIFF'S EXHIBITS 1 and 2 RECEIVED IN EVIDENCE.

10:12 a.m. Cross-examination by Mr. Cowan.

10:13 a.m. No further examination, witness excused.

10:13 a.m. ARTHUR E. HILLMAN duly sworn, special agent, security department of Hawaiian Telephone Company.

Direct examination by Mr. Kuniyuki.

10:16 a.m. PLAINTIFF'S EXHIBIT 5 RECEIVED IN EVIDENCE: Hawaiian Telephone Co. records on Case No. 19-0027-79 (11 pages including tape)

10:16 a.m. Cross-examination by Mr. Cowan.

10:18 a.m. Examination by the Court.

10:19 a.m. No further examination, witness excused.

10:19 a.m. WARREN A. STEWART duly sworn, residing at 5456 Kirkwood Place with defendant.

Direct examination by Mr. Kuniyuki.

10:20 a.m. Cross-examination by Mr. Cowan.

10:30 a.m. Redirect examination by Mr. Kuniyuki.

10:30 a.m. Examination by the Court.

10:31 a.m. Recross-examination by Mr. Cowan.

10:32 a.m. No further examination, witness excused.

10:32 a.m. CHRISTINE NIGRELLI duly sworn, residing at 5456 Kirkwood Place.

Direct examination by Mr. Kuniyuki.

10:34 a.m. Cross-examination by Mr. Cowan.

10:35 a.m. No further examination, witness excused.

10:35 a.m. BRIAN OYADOMORI duly sworn, assistant supervisor at Travelers Insurance Co.

Direct examination by Mr. Kuniyuki.

10:38 a.m. Cross-examination by Mr. Cowan.

10:39 a.m. No further examination, witness excused.

10:40 a.m. DONALD D. COWAN duly sworn, residing at 5456 Kirkwood Place.

Direct examination by Mr. Kuniyuki.

10:45 a.m. COURT RECESSED.

10:52 a.m. COURT RECONVENED.

DONALD D. COWAN resumed the witness stand.

Direct examination continued by Mr. Kuniyuki.

10:55 a.m. No further examination, witness excused.

10:55 a.m. JEANETTE SPOONE-ALLISON duly sworn.

Direct examination by Mr. Kuniyuki.

11:02 a.m. PLAINTIFF'S EXHIBITS 3 and 4 RECEIVED IN EVIDENCE.

11:03 a.m. Cross-examination by Mr. Cowan.

11:14 a.m. No further examination, witness excused:

11:15 a.m. Plaintiff rested.

Defendant's Case:

JAMES ISOBE duly sworn, police lieutenant, records division, Honolulu Police Department.

DEFENDANT'S EXHIBITS A & B MARKED: HPD reports Examination by the Court.

11:17 a.m. Voir dire examination on police records by Mr. Kuniyuki.

11:18 a.m. No further examination, witness excused.

11:18 a.m. DONALD D. COWAN resumed the witness stand on his own behalf and gave his testimony.

11:20 a.m. Examination by the Court.

11:23 a.m. No further examination, witness excused.

Defendant rested.

Opening summation by Mr. Kuniyuki.

11:25 a.m. Answering summation by Mr. Cowan.

11:27 a.m. Court found defendant in contempt of permanent injunction with reference to the provision relating to telephone calls at her place of employment and at her residence. Court broadened injunction in this case that defendant be restrained from calling attorneys formerly or presently involved in this case.

Court sentenced the defendant to 6 months in jail and a \$500 fine; sentence was suspended for a period of 13 months. Any violation of the permanent injunction from this date will result in the Court not only enforcing the sentence but also additional punishment.

11:29 a.m. COURT ADJOURNED.

BY ORDER OF THE COURT: M. MOTOKANE
Clerk

EXHIBIT 2

CIVIL TRIAL CALENDAR

TUESDAY, DECEMBER 11, 1979

HONORABLE HAROLD Y. SHINTAKU, JUDGE, SEVENTH DIVISION, PRESIDING

**COURT CLERK: MERLE MOTOKANE
COURT REPORTER: GRACE WADA
LAW CLERK/BAILIFF: RUSSELL KATO**

4:00 p.m.

CIVIL NO. 57584

CIVIL NO. 57584

JEANETTE SPOONE,

Plaintiff,

KEN T. KUNIYUKI

for Plaintiff

vs.

DONALD D. COWAN, aka

DOUG COWAN,

Defendant.

Pro Se

- 2. MOTION FOR AN ORDER IMPOSING SANCTIONS ON
DEFENDANT FOR CONTEMPT OF COURT (movant:
Mr. Kuniyuki for plaintiff)**

**1. MOTION TO CONTINUE HEARING DATE FOR
PLAINTIFF'S MOTION FOR AN ORDER IMPOSING
SANCTIONS ON DEFENDANT (movant: Mr. Cowan)**

MINUTES:

3:59 p.m Case called.

Representation by Mr. Kuniyuki on motion to continue hearing date; representation by Mr. Cowan. Court stated defendant had since April 5, 1979 to obtain an attorney; motion to continue DENIED.

Representation by Mr. Kuniyuki on motion for contempt.

4:02 p.m. SANDRA ALEXANDER duly sworn; prosecuting attorney.

Direct examination by Mr. Kuniyuki.

4:05 p.m. Cross-examination by Mr. Cowan.

4:09 p.m. No further examination, witness excused.

4:09 p.m. DONALD DOUGLAS COWAN duly sworn; legal secretary at Ikazaki Devens.

Testimony on his own behalf and colloquy with Court.

4:14 p.m. Witness excused.

4:14 p.m. Under Rule 35 Court ordered that defendant be examined by a psychiatrist to determine his mental capabilities. Court refrained from imposing 6-months jail sentence because if defendant were found psychiatrically delusional, any sentence the Court imposed would have no effect; however, Court imposed weekend jail visit by defendant so he would be able to see what it was like.

4:18 p.m. Defendant requested Court send him to jail and fine him \$500.

Since defendant asked for maximum sentence in this case, Court sentenced him to 6 months in Halawa Jail and \$500 fine; also Court recommended that the facility have him psychiatrically examined.

Court requested prosecuting attorney make arrangements to transport defendant to jail; mitimus to issue forthwith.

4:19 p.m. COURT ADJOURNED.

BY ORDER OF THE COURT: /s/M. Motokane,
Clerk

MINUTE ORDER:

December Court interviewed defendant Cowan with court
21, 1979: reporter and law clerk at Halawa Correctional Facility; defendant desired to remain there.

BY ORDER OF THE COURT: /s/M. Motokane,
Clerk

EXHIBIT 3

Of Counsel:
KUNIYUKI & PANG
KEN T. KUNIYUKI 1321
309 Campbell Bldg.
828 Fort Street, Mall
Honolulu, Hawaii 96813
Tel. No. 521-2388
Attorney for Plaintiff

**IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII**

JEANTTE SPOONE,

Civil No. 57584

Plaintiff,

vs.

DONALD D. COWAN, AKA
DOUG COWAN,

Defendant.

RECEIVED AND FILED
DEC 11 1979

MITTIMUS

THE STATE OF HAWAII:

To the Sheriff of the State of Hawaii, or his Deputy;
or any police officer authorized by law:

The above-named defendant having been duly adjudged
guilty in said Circuit Court of the offense of

CIVIL CONTEMPT OF COURT

and in due course said Circuit Court duly imposed the
sentence upon said defendant which is stated on the judg-
ment to be subsequently filed,

YOU ARE HEREBY ORDERED to take said defendant and to deliver him to the Halawa Correctional Facility, State of Hawaii for imprisonment therein for a term of six months, commencing as of the date hereof.

THIS MITTIMUS TO ISSUE FORTHWITH.

WITNESS the Honorable HAROLD SHINTAKU, Judge of the above-entitled Court.

Dated: Honolulu, Hawaii, December 11, 1979.

/s/M. Motokane
Clerk

EXHIBIT 4

**STATE OF HAWAII
DEPARTMENT OF HEALTH
MENTAL HEALTH DIVISION
COURTS & CORRECTIONS BRANCH
550 MAKAPUU AVENUE
HONOLULU, HAWAII 96515**

January 8, 1980

Honorable Harold Y. Shintaku
Circuit Court of the First Circuit
P.O. Box 619
Honolulu, Hawaii 96809

Dear Judge Shintaku:

**COWAN, DONALD D.
aka Doug Cowan
Civil No. 57584**

Donald Cowan is a 34-year-old Caucasian male who has been incarcerated for contempt of court which results from, as I understand it, his not obeying an injunction that sought to prevent him from contacting an ex-girl friend of his.

Rather than to delve into this man's past history I am going to concentrate on his current alleged offense and his mental status.

Some few years ago, perhaps two or three years ago, this man met a young lady, "Jeannie", and she and he went together as girl friend and boy friend, as I understand it. She had been divorced and had a child from a prior marriage. After a while their relationship became strained and ultimately it dissolved. According to this man, Jeannie kept a time piece of his, a watch, which in a number of respects from his point of view, resulted in many of the subsequent events. He felt that this was a

declarative move upon her part which showed that she could push him down. He says, "It was her intention to openly hurt me . . . get away with it . . . she could harm me." Without going into details, I should state this man believes that all subsequent injustices that have befallen him, are, more or less, the fault of Jeannie. He believes that she has let other persons know that he is a bad person, namely his current girl friend, his landlord, his church and his employer. Indeed she "got them against me." This represents clear cut, organized, persecutory delusional material. In response to my question, "Has she been responsible for the destruction of your life?" He answered, "Yes." (It should be noted that I took the opportunity to put words in his mouth because he hedged a number of times when I asked questions in this area.)

This man is suspicious about a psychiatrist; he believes that the psychiatrist might relay word of some of the content of the interview to Jeannie and this will result in her somehow obtaining a sense of victory. He has taken the current drastic step of accepting a six months jail sentence in order to make it clear to Jeannie, and quite possibly to other persons who have heard of his situation, that he is willing to take this drastic step in order to prove that he is willing to undergo any punishment to demonstrate the righteousness of his position or of his cause. Furthermore he says, "I want to put all the responsibility of my life in Jeannie's hands." By this he means that she, upon seeing the major step that he has taken (voluntary incarceration) should realize the wrongfulness of her ways and firstly, let other persons know that she was wrong in saying what she said to them about Donald Cowan, and secondly, she should readjust her emotional appreciation of him along the lines of an awareness that she should understand him and his position to a greater degree. I think there appears to be the unspoken hope that once Jeannie does understand his position then

the relationship between them might substantially change for the better.

At no time during this interview did this man show the least bit of insight into the origin of his current condition. He is able to intellectually verbalize that it is possible, for instance, that he is emotionally disturbed and this might be associated with his current condition; nevertheless, he is unwilling to do anything about this and, it is apparent that, in reality, he does not believe this particular formulation. He pays lip service to it; he realizes that a rational individual recognizes the possibility of himself being emotionally disturbed. In reality his beliefs are substantially delusional and he evidences no desire whatsoever to change his beliefs. Indeed, he feels that Jeannie must change her beliefs in order for there to be any substantial change.

This man, lacking insight, has no motivation whatsoever to change. This man, singularly lacking any complete educational or satisfying occupational involvement or experience in the last decade or so has few socialized goals that are apt to carry him beyond his current situation. Indeed, one might conclude that his current delusional belief has become a crusade with him to the exclusion of considerations of any socialized goals.

I believe that a conventional psychiatric appreciation of this man's psychopathology would indicate that while currently he presents a minimal or negligible potential danger to himself or to other persons, in the long run he may indeed present a substantial potential danger to himself or to other persons. This is based on the following: (a) This man has taken substantial actions that are either associated with, or a result of, his delusional beliefs. He has harassed the victim innumerable times and he has submitted to voluntary incarceration for a six month period in order to demonstrate the validity of his belief. In general, when an individual takes action as a result of a de-

lusional persecutory belief, the action, thought benign at a point in space and time, may easily ultimately turn into an action that is malignant and aggressive in the future. Indeed, typically, as this man might redouble his efforts to obtain vindication and as his efforts fail to obtain the desired vindication, he may propel himself into antagonistic situations with the victim or with her husband and ultimately a dangerous act could well occur. (b) At this point in this man's life he is underemployed, alone and obtaining little satisfaction from life. He has delusionally blamed another party, to a large extent, for his current situation. There is a reasonable likelihood that his situation will further deteriorate; associated with further situational deterioration would be further and more intense blame on his part of the other party with, quite possibly, an increased need to take action on his part that would affect the other party.

This man's mental status is as follows: He is an attractive Caucasian male who physically appears to be from an upper social class. His speech is proper and grammatically correct. Initially, he appears to speak appropriately and reasonably comprehensively. As the conversation goes on however, his speech becomes markedly over specific, over detailed and over precise with a loss of his ability to retain a view of the general situation. He tends to devolve at length upon minor episodes which a listener might ordinarily conclude would have very little to do with the overall situation. It is apparent that, to this man, these minor episodes indeed having meaning far beyond their actual impact. His affect (or emotional responsivity) is markedly constricted. He is generally suspicious throughout, though he was more or less cooperative. When it came to the subject matter of his delusional belief regarding Jeannie, he was utterly intractable to reason. He will not accept psychiatric therapy because this would indicate to Jeannie that she is victorious. Thusly, he cannot accept input from other persons; he must view the current sit-

uation totally as a reflection of the interaction he has with Jeannie.

This man's interpretation of the old proverb "When the cat's away the mice will play," is "People want to do what they want to do . . . if control on it in the form of someone watching . . . when the cat's around the mice will do what they want to do . . . look at it another way the mice really do want to play . . . the cat's a drag." This concrete, ideationally diffuse interpretation of the above proverb is typically schizophrenic. It is entirely incompatible with what a middle class, reasonably intelligent, normal young man would say.

This man's sensorium is clear. Throughout the interview he wanted to demonstrate that he could understand things as others might see them to be; nevertheless, he persistently and unvaryingly demanded that people see things as he sees them.

Diagnosis approximate schizophrenia, paranoid type.

In my opinion, this man presents a minimal danger to himself or to other persons at the present time but may well present a substantial potential danger to himself or to other persons in the future.

In my opinion, this man was not responsible for his behavior at the time of the alleged offense. In my opinion, this man is quite possibly unfit to stand trial.

At the current time this man is totally refractory to voluntary involvement in psychotherapy. Additionally, incarceration will not substantially change his delusional appreciation of his relationship with Jeannie and the effects of this relationship upon himself. I would therefore respectfully suggest that a full sanity commission be empaneled for formal assessment of this man's penal responsibility and fitness to stand trial. In my opinion it would be of great assistance to the members of the sanity commission to have a copy of the letter of December 24,

1979 addressed to Judge Shintaku by the defendant. As this man does not belong in a jail, the place of examination could well be ordered to be Hawaii State Hospital. Should a full sanity commission find this man to be non-responsible for his behavior at the time of the alleged offense or unfit to stand trial, then hospitalization at Hawaii State Hospital may well be indicated. Should this man be found to have been responsible for his behavior at the time of the alleged offense then I would think that all psychiatric avenues for treatment for this man will have been exhausted and the case can be handled strictly on a penal (non-psychiatric) basis.

Lastly, I should add that given this man's recalcitrance to psychiatric therapy at this time I am in no position to suggest that he get therapy at the present time as a condition of release or as a method of hopefully resolving the current situation. In my view this is an unrealistic expectation of psychiatric therapy.

Very truly yours,

/s/Arnold B. Golden, M.D.

ARNOLD B. GOLDEN, M.D.

Psychiatric Consultant

Mental Health Team for Courts and Corrections

cc: Prosecuting Attorney
Defense Attorney
Attorney General
Hawaii State Hospital

EXHIBIT 8

CIVIL NO. 57584

JEANETTE SPOONE,

Plaintiff,

vs.

DONALD D. COWAN, also known
as
DOUG COWAN,

Defendant.

AT TERM: MONDAY, JANUARY 28, 1980, at 4:00 p.m.

PRESENT: HON. HAROLD Y. SHINTAKU, JUDGE, SEVENTH DIVISION, PRESIDING
MERLE MOTOKANE, COURT CLERK
DEBRA CHUN, COURT REPORTER
RUSSELL KATO, LAW CLERK/BAILIFF

COUNSEL: KEN KUNIYUKI, ESQ. and BRIAN PANG, ESQ. for Plaintiff; DONALD D. COWAN pro se.

4:05 p.m. Case called; appearances noted of defendant Cowan, Dr. Arnold Golden, Deputy Prosecuting Attorney Sandra Alexander; no appearance by plaintiff's counsel until 4:17

Court stated that defendant Cowan had asked for an appeal under Section 802-A on the basis of having failed to have counsel at the time of his hearing; right to counsel applied to criminal trials and did not apply in this case. Record showed that the Court talked to the defendant during his hearing and in Halawa Jail; however, he desired to remain in jail and was examined by Dr. Golden.

- 4:06 p.m. Representation by Dr. Golden as to his findings on his psychiatric examination of the defendant.
- 4:09 p.m. Representation by Ms. Alexander regarding matters pending in District Court: M-00566 for harassment and M-00567 for assault. Defendant had been served with a copy of the penal summons; arraignment date Friday, February 1.
- 4:11 p.m. Court's colloquy with defendant regarding suspending sentence if defendant made no further calls or disturbance and voluntarily undergoes psychiatric treatment.
- 4:15 p.m. Defendant agreed to voluntary treatment and no further disturbances; also to make District Court appearance and get court appointed attorney.
- 4:18 p.m. Representation by Ms. Alexander that life of penal summons is 6 months; further comments on District Court matter.
- 4:20 p.m. Comments by the defendant; colloquy with Court.
- 4:29 p.m. Court ordered defendant released and remainder of jail sentence suspended along with \$500 fine. Defendant to undergo psychiatric treatment and not harass, etc. the plaintiff and others. Defendant to make appearance in District Court and have court appoint attorney. No further action to be taken if defendant continues psychiatric therapy and does not disturb plaintiff.
- 4:30 p.m. Hearing concluded

BY ORDER OF THE COURT:

/s/M. MOTOKANE

Clerk

EXHIBIT 9

CIVIL NO. 57584

Spoone v. Cowan

MINUTE ORDER:

February 1, 1980:

10:37 a.m. IN CHAMBERS: Present were Defendant
Cowan, reporter and clerks.

Request by defendant that Court send him back to jail to finish his sentence; colloquy with the Court.

Court stated it would not send him back to jail but would request that District Court proceed with the criminal matter so that sanity hearing would be held. Suggested that defendant talk to his mother, reverend or prison psychiatrist.

10:51 a.m. Concluded.

BY ORDER OF THE COURT:

/s/M. MOTOKANE

Clerk

(Presiding judge in District Court: Judge Klein)

EXHIBIT 10

CIVIL TRIAL CALENDAR

TUESDAY, FEBRUARY 5, 1980

**HONORABLE HAROLD Y. SHINTAKU, JUDGE,
SEVENTH DIVISION, PRESIDING**

**COURT CLERK: M. MOTOKAANE
COURT REPORTER: KAWIKA MAANO
LAW CLERK/BAILIFF: RUSSELL KATO**

10:30 a.m.

CIVIL NO. 57584

JEANETTE SPOONE,

KEN T. KUNIYUKI

Plaintiff,

for Plaintiff

vs.

DONALD D. COWAN,
also known as DOUG
COWAN,

Pro Se

Defendant.

MINUTES:

10:37 a.m. Informal conference with interested parties;
present were: Ken Kuniyuki, Rev. Doug Olson,
Deputy Prosecuting Attorney Sandra Alex-
ander, Dr. Arnold Golden, Andrew Hartnett,
John Roney and defendant Cowan.

Comments by the Court on developments and
reason for conference.

10:40 a.m. Defendant left hearing room.

10:41 a.m. Comments by Rev. Olson as to defendant's
change in attitude

10:44 a.m. Comments by Dr. Golden as to indications for
defendant being institutionalized.

- 10:45 a.m. Comments by Mr. Hartnett as to circumstances he was personally aware of.
- 10:46 a.m. Comments by Mr. Roney as to fire and bomb scare.
- 10:47 a.m. Comments by Mr. Kuniyuki as to Bob Martin receiving calls at his residence after defendant was released, etc.
- 10:48 a.m. Comments by Ms. Alexander as to district court matter.
- 10:50 a.m. Further colloquy among the parties.
- 11:07 a.m. Defendant re-entered hearing room.
Court stated to defendant that he would be sent back to Halawa to serve the remainder of his term in the medical ward.
- 11:08 a.m. Comments by defendant; colloquy with Court.
- 11:12 a.m. Defendant to be taken forthwith to jail; procedures to be commenced for involuntary commitment.
- 11:14 a.m. Conference concluded.

BY ORDER OF THE COURT:

/s/ M. MOTOKANE

Clerk

EXHIBIT 11

**IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII**

JEANETTE SPOONE

Civ. No. 57584

Plaintiff,

vs.

**DONALD D. COWAN, aka
DOUG COWAN,**

Defendant.

**FILED
1980 FEB 5 PM 12:
RS YAMADA
CLERK**

MITTIMUS

THE STATE OF HAWAII:

To the Sheriff of the State of Hawaii, or his Deputy;
or any police officer authorized by law:

The above-named Defendant having been duly adjudged
guilty in said Circuit Court of the offense of

CIVIL CONTEMPT OF COURT

and in due course said Circuit Court duly imposed the
sentence upon said Defendant which is stated on the Judg-
ment heretofore filed on December 18, 1979.

YOU ARE HEREBY ORDERED to take said Defendant
and to deliver him to the Halawa Correctional Facility,
State of Hawaii for imprisonment therein for a term of
four months, commencing as of the date hereof.

THIS MITTIMUS TO ISSUE FORTHWITH.

WITNESS the Honorable HAROLD SHINTAKU, Judge
of the above-entitled Court.

DATED: Honolulu, Hawaii, FEB 5 1980

216a

/s/ R. S. YAMADA
Clerk

EXHIBIT 22

OFFICE OF THE PUBLIC DEFENDER
MARIE N. MILKS
ACTING PUBLIC DEFENDER
BY: LAWRENCE A. GOYA 2476-0
DEPUTY PUBLIC DEFENDER
SUITE 200
200 NORTH VINEYARD BLVD.
HONOLULU, HAWAII 96817
TEL. NO. 548-6273
ATTORNEYS FOR DEFENDANT

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

JEANETTE SPOONE

Plaintiff,

vs.

DONALD D. COWAN, aka
DOUG COWAN,

Defendant.

CIV. NO. 57584

AMENDED ORDER ON
DISPOSITION

FILED

1980 APR 7 AM 11:26

AMENDED ORDER ON DISPOSITION

Whereas one of the conditions of the judgment in the above-entitled action was that defendant DONALD D. COWAN submit himself to psychiatric examination, and this Court now being aware of defendant's willingness to do so; and

The Court further being aware that defendant had been ordered by the Honorable Andrew J. Salz, District Court of the First Circuit, Honolulu Division, to be examined by

a three member examination panel at Hawaii State Hospital; now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the results of the three member examination panel be incorporated within the Judgment in the above-captioned matter; to be given such weight as justice may require,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pursuant to this Order, Defendant is hereby committed to the custody of the Director of Health to be placed in an appropriate institution for custody, care, evaluation, and treatment while being examined by the three member examination panel under Section 404 of the Hawaii Penal Code,

IT IS FURTHER ORDERED that the person having custody of the Defendant shall forthwith make arrangements with the Administrator of Hawaii State Hospital for admission to said Hospital of said Defendant within 5 days from receipt of this Order.

Counsel for the Defendant shall cause to be delivered copies of this Order to the Director of Health, the Hawaii State Hospital, and to such person as may have present custody of the Defendant.

DATED: Honolulu, Hawaii, 4/7/80.

/s/HAROLD Y. SHINTAKU /SEAL/
JUDGE OF THE ABOVE-ENTITLED
COURT

EXHIBIT 6

IN THE DISTRICT COURT OF THE FIRST CIRCUIT

HONOLULU DIVISION

State of Hawaii

STATE OF HAWAII

vs.

DONALD D. COWAN

D C Complaint No. C1981-703

D C Mittimus No. --

H P D Report No. M-00567

For and in violation of Section
707-712 HPC

(Assault, 3rd DEGREE)

COMMITMENT TO CIRCUIT COURT

On the 24th day of March 1981, the defendant above named having been arraigned to answer to the charge of, to-wit:

District Court of the First Circuit, Honolulu Division, State of Hawaii, Complaint: Jeanette Spoon says that Donald D. Cowan, aka Doug Cowan, on the 28th day of March 1979, in Honolulu, City and County of Honolulu, State of Hawaii, did intentionally, knowingly or recklessly cause bodily injury to the person of Jeannette Spoon thereby committing the offense of Assault in the 3rd Degree in violation of Section 712 of the Hawaii Revised Statutes—Hawaii Penal Code. Subscribed and Sworn to before me this 21st day of January, 1980, Sandy Alexander, City and County of Honolulu.

and said defendant _____having demanded jury trial, I therefore this day commit said defendant _____for trial by a jury to the Circuit Court of the First Circuit of the State of Hawaii

Bail set at \$_____

_____Bond filed by_____

_____Cash Posted

_____In custody at_____

X O.R.

GIVEN UNDER MY HAND

THIS 24th day of March, 1981

/s/EDWIN H. HONDA

Judge of above entitled

Court.

(EDMUND YEE) Esq.

Attorney for

Defendant

Deft ordered to appear in the Circuit Court on April 13, 1981, 8:30 a.m. Deft referred to Public Defender's Office.

EXHIBIT 15

**IN THE DISTRICT COURT OF THE FIRST CIRCUIT
HONOLULU DIVISION**

STATE OF HAWAII

STATE OF HAWAII

Violation of Section 707-712
Hawaii Penal Code

vs

DONALD D. COWAN,

Defendant.

STATE OF HAWAII

Violation of Section 711-1106
Hawaii Penal Code

vs

DONALD D. COWAN,

Defendant.

TRANSCRIPT

of proceedings before the Honorable Andrew J. Salz,
Judge, Presiding; on Tuesday, the 25th day of March, 1980.

APPEARANCES:

CHRISTINE KURASHIGE
Deputy Prosecuting Attorney
City and county of Honolulu
State of Hawaii

For the State of Hawaii

LAWRENCE GOYA
Deputy Public Defender
State of Hawaii

For the Defendant

REPORTED BY:

MARILYNNE J GRILHO
Court Reporter
District Court of the

First Circuit
State of Hawaii

MISS KURASHIGE: Cases 19A and 20A, Donald Cowan.

MR. GOYA: Donald Cowan is present with Larry Goya, Deputy Public Defender. This is a hearing on fitness on Mr. Cowan. We have discussed the case with Mr. Cowan yesterday at Hawaii State Prison, and my advice to him was to have a mental examination done.

He feels that he is not a person fit—or not a person that should take a mental examination, Your Honor. And he has also informed me that he wishes to represent himself per se [sic]. I feel that Mr. Cowan is a person that needs professional help, and—

THE COURT: You have spoken to me about this case before, and I understand that Mr. Cowan has another three months at least to serve on the sentence that was passed on him by Judge Shintaku. And I have also read Dr. Golden's letter which is on file in this matter, and it is the Court's very definite feeling that we're going to require a three-man board to examine Mr. Cowan.

Now, this is for your benefit, Mr. Cowan. And you're already incarcerated under another Judge's order. So we're not holding you in jail. That is, this—when I say, we, this Court is not holding you in jail improperly and against your will. You're there already.

And the Court on its own motion, due to the fact that you won't be making the motion yourself, the Court is empowered on its own motion to order that a study be made. Dr. Golden has already examined you, so I'm going to order at this time, under Section 704-440, that a three-man board be appointed. One of which—I would urge you, if you feel that you are being unfairly treated in this matter, that you have all your senses on a hundred percent

basis, the way to assist yourself, since you're in jail anyway, is to talk to these people who are experts in the field, and see if they can help you.

Now, if you aren't a person who is fully within your senses, and in all respects, think you're fit to stand trial, and you do have the ability to control your actions so they conform with the law, talk to these psychiatrists. Tell them what goes on in your mind and in your personal life, and your problems, and they are the kind of people that are people that can help you. So, trust them, so you won't waste their time because—

MR. COWAN: Do I have an option to refuse?

THE COURT: I don't think you have the option. Some people can be uncooperative. Look, if you decide that you're not going to talk, nobody is going to break your arm. But what happens, is that you simply will wind up continuously in custody on this kind of matter.

It's kind of a mis-treatment of yourself to refuse to cooperate that will get you absolutely nowhere. These people can help you get out and can also help with your problems with Judge Shintaku. Unless you enjoy the business of being in jail, they can, if you cooperate with them, and you try to understand their point of view, and they try to understand yours, not only can help you with the judge who's handling the case, who will be sitting on this bench, may very well not be me.

The psychiatrists will also help you with Judge Shintaku, who has your case at the present time, and as I understand, you were given the option before Judge Shintaku to accept what examination or treatment you chose. On your part, you chose to spend time in jail. I would think this is beginning to get tiresome.

MR. COWAN: It is tiresome.

THE COURT: You're not proving any points to anyone or anybody. And I would strongly urge you to take my advice in the matter, and cooperate with the doctors.

MR. COWAN: I would like to get a little information from you, if I can. My primary purpose is not to prove that I wasn't guilty, or to get off, my primary purpose is to somehow convince her that I love her and care about her, and would like to be cared for by her. And that's the bottom line. I'm willing if I find myself—the bottom line is I'm willing to go to jail for an additional year or six months on that.

THE COURT: That's not going to sell Jeannie or anybody. Nobody in the world is going to be convinced by your willingness to stay in jail that you love her. All you're doing is forcing incarceration on yourself, and being a heavy financial burden on the State. And that is all that is being accomplished. Nothing more.

MR. COWAN: I can't—that's the only communication with Jeannie that is left. And—

THE COURT: It's not a way that is left. It's a way that isn't left, and somehow you latched on to it. It's a very sad state of events that you should latch on to that.

MR. COWAN: I say I'm willing to admit that I'm psychotic. I've read some books where the words in them have meaning for me to understand. And I'm willing to be treated. In fact, I did make the offer in jail.

I was released on my voluntarily going to see a psychiatrist, and was going to be released from jail. And then I was—Sandra Alexander felt it important to threaten me with two new charges. They didn't get that. However, I was voluntarily—

THE COURT: The Court can't take that into consideration now. The judge can't take into consideration the fact that you love somebody, and want to go to jail as a

way to prove your love. The Court system is not geared up to take that into consideration in dishing out a sentence.

You can see the Courtroom is very full. We won't have time to discuss this. It's not my job to discuss this matter. The people whose job it is to discuss these matters are the three members of the board that is being appointed to both examine you and to assist you. You can talk to them and perhaps work out some kind of counseling with them. Something of that nature perhaps could be worked out in some fashion.

That is your route to working something out to improve that general level of your life. That's all I can suggest to you. All I can say to you is I hope, rather than resisting it, you will work with them because that is the only way they are going to work towards solutions.

And the solution is not going to be proving your love to a lady who has already indicated that—as I understand, Jeannie has indicated—from Dr. Golden, Jeannie has indicated she has no further interest in you. So, if you prove something, prove that you love somebody who doesn't want you, you're just wasting your time. You've got to find other people in other directions for life. I hope you will be able to do that.

MR. COWAN: What I want to—I'm willing to be treated. If I refuse to cooperate in this examination, can I be held indefinitely in jail, or just for a maximum of one year that I'm sentenced?

THE COURT: I can't even attempt to handle Judge Shintaku's case you're talking about. And that's not your problem. Your problem is right now, right now, if you're willing to accept treatment, you could probably voluntarily—I don't know. You probably could work out some way with Judge Shintaku where you could go to Hawaii State Hospital instead of staying in prison, and be taking treat-

ment which would make you fit to come back into the world, instead of staying in jail.

You've shifted away. Sort of hidden yourself away, rather than facing up to the fact that somebody that you love, doesn't want you. You've got to recognize the world is full of people. You've isolated yourself to where there were only two people in the world. I've got news for you. Look around and you will see that's not true.

Now, your route to solving your problems, is the three-man board that we have appointed. So, if you want to try to work things out even sooner, there is nothing to stop you from talking to Dr. Golden, who is there at Halawa, in case you want to go and talk to him.

I'm not going to make any predictions about what the other judge will do. I'm simply going to furnish you with the three psychiatrists who can work with you and talk to you, suggesting ways of treatment. And mostly try to end this quirk that you've got. You want to prove something to somebody who isn't looking, and—

MR. GOYA: If I may say that I talked with Dr. Golden yesterday, and he suggested that maybe the best way of handling this situation would be with a three member board. But if Mr. Cowan could be transferred to Hawaii State Hospital and be treated while he's being evaluated—

THE COURT: I can't transfer him to Hawaii State Hospital because judge Shintaku— I'd like to have that three-man board. I'm going to order this three-man board. If judge Shintaku would like to adopt this three-man board as his board also, and order him to be transferred to Hawaii State Hospital for treatment during the remainder of the term. That would be a real splendid idea. Now, I want you to listen very carefully to Mr. Goya.

I hereby certify true and correct transcript of proceedings before the Honorable Andrew J. Salz, Judge Presiding: on Tuesday, the 25th day of March, 1980.

/s/ Marilynne J. Grilho
Marilynne J. Grilho
Court Reporter
District Court of the
First Circuit
State of Hawaii

EXHIBIT 19

OFFICE OF THE PUBLIC DEFENDER
MARIE N. MILKS
ACTING PUBLIC DEFENDER
BY: LAWRENCE A. GOYA 2476-0
DEPUTY PUBLIC DEFENDER
SUITE 200
200 NORTH VINEYARD BLVD.
HONOLULU, HAWAII 96817
TEL. NO. 548-6273

ATTORNEYS FOR DEFENDANT

IN THE DISTRICT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

STATE OF HAWAII

vs.

DONALD COWAN,

Defendant.

CASE NO. 19A OF 3/25/87

ASSAULT IN THE THIRD DE-
GREE
(\$ 707-712, H.R.S.)

CASE NO. 20A OF 3/25/87

HARASSMENT
(\$711-1106, H.R.S.)

MOTION FOR MENTAL
EXAMINATION OF
DEFENDANT;
AFFIDAVIT OF COUNSEL

FILED

APR 8, 1980 11:22 AM

MOTION FOR MENTAL EXAMINATION OF
DEFENDANT

**MOTION FOR MENTAL EXAMINATION OF
DEFENDANT**

Defendant hereby gives notice of intention to rely on the defense of mental irresponsibility and hereby moves for a mental examination of the defendant was provided for by Section 404 of the Hawaii Penal Code.

The undersigned believe that the defendant is in need of a mental examination to determine his/her mental condition at the time of the alleged offense(s) and at the present time[.]

[MATERIAL DELETED IN PRINTING]

EXHIBIT 20

IN THE DISTRICT COURT OF THE FIRST CIRCUIT

HONOLULU DIVISION

STATE OF HAWAII

STATE OF HAWAII

CASE NO. 19A OF 3/25/87

vs

ASSAULT IN THE THIRD DEGREE

DONALD COWAN,

(§707-712, H.R.S.)

Defendant.

CASE NO. 20A of 3/25/87

HARASSMENT

(§711-1106, H.R.S.)

AFFIDAVIT OF COUNSEL

AFFIDAVIT OF COUNSEL

STATE OF HAWAII

)

) SS.

CITY AND COUNTY OF HONOLULU

)

LAWRENCE A. GOYA, being first duly sworn on oath, deposes and says:

1. That affiant is the court-appointed attorney for the above-named Defendant in the above-captioned matter;

2. That affiant spoke with the Defendant about the above-captioned matter;

3. That affiant alleges upon information and belief:

a. That the Defendant's explanation as to his motivation in committing the alleged acts lead the affiant to believe that the Defendant may be mentally disturbed;

b. That Defendant had been examined by Dr. Arnold Golden on a related civil matter and it was Dr. Golden's

professional opinion that Defendant was suffering from a mental disease, disorder or defect;

4. That based upon the above, affiant believes that the Defendant may be suffering from a mental disease, disorder or defect which may adversely affect Defendant's capacity to understand the proceedings against him to assist in his own defense, to appreciate the wrongfulness of his conduct, to conform his conduct to the requirements of the law.

FURTHER, Affiant sayeth naught.

/s/ LAWRENCE A. GOYA
LAWRENCE A. GOYA

Subscribed and sworn to before me this
8th day of April, 1980.

/s/TONIKA SAKAI

Notary Public
First Judicial Circuit
State of Hawaii

My Commission Expires: 1-2-84

EXHIBIT 21

OFFICE OF THE PUBLIC DEFENDER
MARIE N. MILKS
ACTING PUBLIC DEFENDER
BY: LAWRENCE A. GOYA 2476-0
DEPUTY PUBLIC DEFENDER
SUITE 200
200 NORTH VINEYARD BLVD.
HONOLULU, HAWAII 96817
TEL. NO. 548-6273

IN THE DISTRICT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII

CASE NO. 19A of 3/25/80

vs.

ASSAULT IN THE THIRD DE-
GREE

DONALD COWAN,

(§707-712, H.R.S.)

Defendant.

CASE NO. 20A of 3/25/80

HARASSMENT
(§71-1106, H.R.S.)

ORDER FOR EXAMINATION OF
DEFENDANT AND APPOINT-
ING EXAMINERS

**ORDER FOR EXAMINATION OF
DEFENDANT AND APPOINTING EXAMINERS**

Defendant having moved for a mental examination and
good cause appearing therefor, it is

ORDERED that further proceedings herein be sus-
pended; and further

ORDERED that the above-named defendant be exam-
ined by:

DR. JARRET H. C. KO (Private Psychiatrist)

DR. NANCY KNIGHT (Private Psychologist)

DR. THEODORE GOLDMAN (State Psychiatrist) all qualified as examiners in insanity, who are hereby appointed for the purposes herein set forth. The examiners shall file a written report on their findings within 30 days from the date hereof, or within such extended period as may be allowed by the court.

The examination and the report thereon shall be such as to advise the court on the following questions:

1. Does the defendant *at the present time* lack capacity to understand the criminal proceedings against him/her or to assist in his/her own defense, *as a result of mental disease or disorder?* (fitness to proceed)

2. Did the defendant *at the time of the offense alleged against him/her* lack substantial capacity *as a result of mental disease or disorder* either to appreciate the wrongfulness of his/her conduct (cognitive capacity) or to conform his/her conduct so as not to commit the *particular offense with which he/she is charged?* (volitional capacity)

The term "mental disease or disorder", as used herein, does not include an abnormality manifested only by repeated penal or otherwise anti-social conduct.

The report of the examiners shall include the following:

- (a) A description of the nature of the examination;
- (b) A diagnosis of the mental condition of the defendant at the present time and at the time of the alleged offense;
- (c) If the defendant is presently suffering from a mental disease or disorder, an opinion as to the extent, if any, to which such mental disease or disorder has impaired his/her capacity to understand the criminal proceedings against him/her or to assist in his/her own defense;

(d) If the defendant was at the time of the alleged offense suffering from a mental disease or disorder, an opinion as to the extent, if any, to which *such mental disease or disorder* impaired

- (i) his/her capacity to know that what he/she was doing was wrong; and
- (ii) his/her capacity to control him/herself from committing *the particular offense charged*.

IF THE OPINION OF THE EXAMINERS is that the defendant is presently not fit to proceed or that the defendant was substantially lacking in cognitive capacity, volitional capacity or both capacities at the time of the alleged offense, the examination and the report thereon shall further advise the court of

(a) the examiners' opinion as to the risk of danger which the defendant currently presents to him/herself or to the person or property of others as a result of his/her current mental condition; and

(b) if such risk of danger is present, the examiners' recommendation as to whether the defendant should be treated in the State Hospital (in-custody treatment) or whether he/she may be safely released and treated as an out-patient (if release is recommended, any conditions which should be attached to such release should be stated).

IT IS FURTHER ORDERED that the above named defendant be examined at Hawaii State Hospital.

DATED: Honolulu, Hawaii, APR 8 1980.

/s/ BERTRAM T. KANBARA [SEAL]
JUDGE OF THE ABOVE ENTITLED
COURT

EXHIBIT 24

**NANCY A. KNIGHT, Ph.D., INC.
CLINICAL PSYCHOLOGIST**

April 21, 1987

Honorable Bertram T. Kanbara
District Court of the First Circuit
P.O. Box 619
Honolulu, Hawaii 96809
Re: Donald D. Cowan
No: 19A of 3/25/80
20A of 3/25/80
Dear Judge Kanbara:

The defendant was seen at Hawaii State Hospital on April 17, 1980. Examination consisted of reviewing Dr. Arnold B. Golden's report of January 8, 1980; 2) reviewing the defendant's hospital records; 3) a two-hour interview with the defendant, including the administration of a psychological test; and 4) subsequent review of police records.

As a result of my examination I have reached the following conclusions:

- 1) The diagnosis now and at the time of the alleged offense is Obsessive Neurosis, with borderline and depressive features.
- 2) The defendant has the capacity to understand the proceedings against him and to assist in his defense.
- 3) At the time of the alleged offense, the defendant lacked the capacity to appreciate the wrongfulness of his conduct and to conform his behavior to the requirements of the law. I believe that the defendant never intended to commit any offense, and that he was obsessed with a need only to justify his previous behavior. It should be noted that the equally obsessive behavior

of the complaining Witness was an indispensable ingredient in the escalation of this conflict.

4) The defendant presents minimal risk to himself or to the person or property of others.

5) I recommend that the defendant be released, with the requirement that he be treated weekly by a psychotherapist of his choice, for six to twelve months, or until his obsessional state is resolved. Goals of treatment should include 1) resolving grief from past losses 2) developing more adequate coping skills 3) formulating long-range goals and a plan for achieving them. Prognosis is excellent.

Sincerely yours,

/s/NANCY A. KNIGHT, Ph.D.

Nancy A. Knight, Ph.D.

Psychologist, Certified Hawaii

CC: Defense Attorney
 Prosecuting Attorney
 Jarret H. C. Ko, M.D.
 Theodore Goldman, Ph.D.

EXHIBIT 25

PS!

PSYCHIATRIC SERVICES, INC.

JARRET H. C. KO, M.D.

MEDICAL DIRECTORS

PHONE (602) 551-1920

May 1, 1980

Honorable Bertram T. Kanbara

District Court of the First Circuit

842 Bethel St.

Hono, Hi 96813

Re: Donald D. Cowan Case Nos. 19A and 20A of 3/25/80

Dear Judge Kanbara:

As requested by your court, the defendant was seen and examined by me at the CISU of the Hawaii State Hospital on 4/10/80.

On the basis of this interview, my diagnosis of the defendant is Obsessive-compulsive Personality.

It is also my conclusion that the defendant is capable of understanding the nature of the proceedings against him and of assisting in his own defense.

Although I would agree with Dr. Knight's opinion "that the defendant never intended to commit any offense, and that he was obsessed with a need only to justify his previous behavior", I do not feel that his cognitive or voli-

tional capacities were substantially impaired at the time of the alleged offenses.

At the time of the interview, Mr. Cowan's behavior and mood were characterized by paranoid and depressed features. These are probably the same features that Dr. Golden referred to in his report of January 8, 1980. While I obviously do not agree with his diagnosis of Schizophrenia, I am concerned that Mr. Cowan may be on the verge of a major emotional breakdown that could very well develop into a blatant psychotic state. Because of this, I recommend that Mr. Cowan be required to be in individual psychotherapy. Without proper and effective treatment, he could decompensate and become a definite risk to himself and to the person and property of others.

I hope that his report will answer your questions and assist you in resolving this case.

Respectfully,

/s/JARRET HC KO, M.D.
JARRET HC KO MD

EXHIBIT 26

April 18, 1980

Honorable Bertram T. Kanbara
District Court of the First Circuit
842 Bethel Street
Honolulu, Hawaii 96813

Dear Judge Kanbara:

DONALD COWAN, Case Nos. 19A and 20A of 3/25/80

The defendant's police file regarding Case Nos. 19A and 20A of 3/25/80, Assault in the Third Degree and Harassment, respectively, were examined at the Prosecutor's Office. Also the defendant's clinical chart at Hawaii State Hospital was examined, a letter from Dr. Arnold B. Golden was examined and the defendant was interviewed at Hawaii State Hospital, CISU II for two hours.

At the time of the alleged offense, it is the opinion of this writer that the defendant was not suffering from a mental disease, disorder or defect, and therefore his cognitive and volitional capacities were in no way diminished.

The defendant showed substantial naivety, obsessive features, but no ongoing psychosis: There is a neurotic process based on his adamant position-taking, but nothing to suggest that defendant lacked control of any of the mental faculties necessary to conform his behavior to the confines of law. Other than the unwillingness to be compromised, and the extreme means by which the defendant chose to assert his independence from both rejection and pressure from others, there is little to support Dr. Golden's opinion of delusional process or paranoid state.

However, as the defendant continues in institutionalizing himself, there may be a "domino effect," which could precipitate a nervous breakdown. Defendant seems to persist

in his desire to make a point to his victim, that he merely wants an amicable separation. However, since he cannot achieve a constructive dialogue with the victim and cannot let go of his desire to accomplish same, this, in and of itself, can provide substantial stress and precipitating factor in a subsequent mental breakdown.

It has been requested of Dr. Nancy Knight that some projective work be done in order to determine any incipient breakdown, contributing to an evaluation of fitness to proceed. Defendant was encouraged to retain an attorney to represent him. Defendant indicated that he did not wish to use the insanity plea, and was "discharging" the attorney of record, Mr. Goya.

Sincerely,

/s/Theodore J. Goldman, Ph.D.
Psychological Consultant
Courts and Corrections Branch

cc: Defense Attorney
Prosecuting Attorney
Attorney General
Hawaii State Hospital
Jarret H. C. Ko, M.D.
Nancy Knight, Ph.D.

EXHIBIT 27

**IN THE DISTRICT COURT OF THE FIRST CIRCUIT,
HONOLULU DIVISION**

STATE HAWAII

STATE OF HAWAII

vs.

DIST. CRT. #13A

DONALD D. COWAN,

Defendant.

VIOLATION OF SECTION 707-
712 HRS
(ASSAULT IN THE THIRD DE-
GREE) 1

TRANSCRIPT

of proceedings of the above-entitled matter, before the
Honorable Edwin H. Honda, Judge Presiding on the 10th
day of July, 1980.

APPEARANCES:

ROBERT YOUNG

Deputy Prosecuting Attorney
for the State

CALVIN FUKUHARA

Deputy Public Defender
for the Defendant

REPORTED BY:

Kanani Holt
Court Reporter
District Court of the
1st Circuit
State of Hawaii

[PAGE 45]

THE COURT: I remind both Counsel this is an assault
case. I don't know what moving the bike in any detail
would have any bearing upon the case.

MR. FUKUHARA: Your Honor, the relevance would be justification based on a defense of property. I intend to put my client on the stand to testify on this.

MR. YOUNG: Your Honor, I don't think the self-defense extends to—defense of property to hit someone.

THE COURT: Continue.

MR. FUKUHARA: Q You stated a neighbor was chasing the Defendant?

A That's correct, and me.

A You saw a neighbor chasing him with a golf club? You saw him chasing him with any weapon in his hand like a club?

A No, there was a long stick, approximately three feet long.

MR. FUKUHARA: No further questions, your Honor.

REDIRECT EXAMINATION

BY MR. YOUNG:

Q Mr. Ellison, let's go back to the rock. You know how far the rock was thrown?

EXHIBIT 29

Of Counsel:
YAMAMOTO & YEE
EDMUND K. U. YEE 1875-0
Suite 1511
1164 Bishop Street
Honolulu, Hawaii 96813
Telephone No. 523-7034
Attorney for Defendant

**IN THE DISTRICT COURT OF THE FIRST CIRCUIT
HONOLULU DIVISION
STATE OF HAWAII**

STATE OF HAWAII

v.

DONALD D. COWAN,

Defendant.

Case No. 21P of
February 4, 1981

ASSAULT IN THE THIRD DE-
GREE

ORDER GRANTING MOTION
FOR
TRIAL DE NOVO, BY JURY

FEB 18 351 PM '81
DISTRICT COURT OF
THE FIRST CIRCUIT
CLERK: M. CHON

**ORDER GRANTING MOTION FOR TRIAL DE NOVO, BY
JURY**

Defendant's Motion for Trail De Novo, By Jury having come on for hearing before the Honorable Edwin H. Honda on January 13 and February 4, 1981, and the Court having orally granted said motion on the ground that the evidence was absent any showing that the Defendant was advised of his right to a jury trial,

IT IS HEREBY ORDERED that the verdict and judgment entered in the above-entitled matter on July 10, 1980 and December 30, 1980 respectively be and are hereby set aside and that the motion for new trial be and is hereby granted.

DATED: Honolulu, Hawaii, February 18, 1981.

/s/ EDWIN H. HONDA
JUDGE OF THE ABOVE-ENTITLED
COURT

NO OBJECTION AS TO FORM:

/s/ Robert M. Young
DEPUTY PROSECUTING ATTORNEY
City and County of Honolulu

EXHIBIT 31

CHRISTOPHER R. EVANS, 2463

4 South King Street
Honolulu, Hawaii 96813
Telephone: 524-5600

Advisory Counsel

DONALD D. COWAN

Armed Forces YMCA—#4060
250 South Hotel Street
Honolulu, Hawaii 96813
Telephone: 524-5600

Defendant Pro Se

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII

CR. NO. 55545

v.

ASSAULT IN THE THIRD DEGREE

DONALD D. COWAN,

Defendant.

**ORDER GRANTING
DEFENDANT'S
MOTION TO DISMISS THE
COMPLAINT WITH PREJUDICE
FOR LACK OF SPEEDY TRIAL**

FILED

1982 JAN 22 PM 2:38

**ORDER GRANTING DEFENDANT'S MOTION
TO DISMISS THE COMPLAINT WITH
PREJUDICE FOR LACK OF SPEEDY TRIAL**

Defendant's Motion to dismiss the Complaint with Prejudice for Lack of Speedy Trial having come on for hearing on December 23, 1981, before the Honorable Bertram T.

Kanbara, and the court being fully advised of the premises therein,

IT IS HEREBY ORDERED that the aforesaid motion be, and the same is hereby granted.

Dated at Honolulu, Hawaii, JAN 18, 1982.

/s/ Bertram T. Kanbara [SEAL]

BERTRAM T. KANBARA

Judge of the above-Entitled Court

APPROVED AS TO FORM:

/s/ REINETTE W. COOPER

REINETTE W. COOPER

Deputy Prosecuting Attorney

APPENDIX T
HAWAII REVISED STATUTES
(1976 & Supp 1979)*

CHAPTER 603
CIRCUIT COURTS

§603-1 Judicial circuits. The State is divided into four judicial circuits, as follows:

- (1) The first judicial circuit is the island of Oahu and all other islands belonging to the State not hereinafter mentioned, and the district of Kalawao on the island of Molokai;
- (2) The second judicial circuit includes the islands of Maui, Molokai (except the Kalawao district), Lanai, Kahoolawe, and Molokini;
- (3) The third judicial circuit is the island of Hawaii;
- (4) The fifth judicial circuit includes the islands of Kaula and Niihau.

§603-2 Title. There shall be established in each of the judicial circuits of the State a court with the powers and under the conditions hereinafter set forth, which shall be styled the circuit court of such circuit, as, for instance, the circuit court of the third circuit.

§603-21.5 General. The several circuit courts shall have jurisdiction, except as otherwise expressly provided by statute, of:

- (1) Criminal offenses cognizable under the laws of the State, committed within their respective circuits or transferred to them for trial by change of venue from some other circuit court;

*All Hawaii statutory material in these appendices corresponds to that in effect at the times relevant to the allegations of the complaint in the courts below.

- (2) Actions for penalties and forfeitures incurred under the laws of the State;
- (3) Civil actions and proceedings, in addition to those listed in sections 603-21.6, 603-21.7, and 603-21.8.

§603-21.6 Probate. The several circuit courts shall have power to grant probate of wills, to appoint personal representatives, to determine the heirs at law or devisees of deceased persons and to decree the distribution of decedents' estates, to appoint guardians of the property, to compel personal representatives and such guardians to perform their respective trusts and to account in all respects for the discharge of their official duties, to remove any personal representative or any such guardian and to do all other things as provided in chapter 560.

§603-21.7 Nonjury cases. The several circuit courts shall have jurisdiction, without the intervention of a jury except as provided by statute, as follow:

(a) Of actions or proceedings:

- (1) For the determination and declaration of heirs of deceased persons, which jurisdiction shall be in addition to the probate jurisdiction of the court;
- (2) For the admeasurement of dower and curtesy, or the partition of real estate;
- (3) For enforcing and regulating the execution of trusts, whether the trusts relate to real or personal estate, for the foreclosure of mortgages, for the specific performance of contracts, and except when a different provision is made they shall have original and exclusive jurisdiction of all other cases in the nature of suits in equity, according to the usages and principles of courts of equity;

(b) Of actions or proceedings in or in the nature of habeas corpus, prohibition, mandamus, quo warranto, and

all other proceedings in or in the nature of applications for writs directed to courts of inferior jurisdiction, to corporations and individuals, as may be necessary to the furtherance of justice and the regular execution of the law.

* * *

§603-21.9 Powers. The several circuit courts shall have power:

- (1) To make and issue all orders and Writs necessary or appropriate in aid of their original or appellate jurisdiction;
- (2) To administer oaths;
- (3) To compel the attendance of parties and witnesses from any part of the State, and compel the production of books, papers, documents or tangible things;
- (4) To admit to bail persons rightfully confined in all bailable cases, or to dispense with bail as provided by the State constitution;
- (5) To issue warrants for the apprehension, in any part of the State, of any person accused under oath of a crime or misdemeanor committed in any part of the State and to examine and commit the person to prison according to law, for trial before the circuit court of the circuit in which the offense was committed, to fix bail and generally to perform the duties of committing magistrate;
- (6) To make and award such judgments, decrees, orders, and mandates, issue such executions and other process, and do such other acts and take such other steps as may be necessary to carry into full effect the promotion of justice in matters pending before them.

* * *

CHAPTER 604 DISTRICT COURTS

§604-1 Judicial circuits; district judges; sessions.
There shall be established in each of the judicial circuits of the State a district court with the powers and under the conditions herein set forth, which shall be styled as follows;

- (1) For the First Judicial Circuit: The District Court of the First Circuit.
- (2) For the Second Judicial Circuit: The District Court of the Second Circuit.
- (3) For the Third Judicial Circuit: The District Court of the Third Circuit.
- (4) For the Fifth Judicial Circuit: The District Court of the Fifth Circuit.

There shall be appointed one or more district judges for each judicial circuit. The district court of the first circuit shall consist of fourteen judges, who shall be styled as first, second, third, fourth, fifth, sixth seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth judge, respectively. One of the district judges shall hear landlord-tenant and small claims matters, provided that when in the discretion of the chief justice of the supreme court the urgency or volume of cases so requires, the chief justice may authorize the judge to substitute for or act in addition to or otherwise in place of any other district judge of the district court of the first circuit. The district court of the second circuit shall consist of three judges, who shall be styled as first, second, and third judge, respectively. The district court of the third circuit shall consist of three judges, who shall be styled as first, second, and third judge, respectively. The district court of the fifth circuit shall consist of two judges who shall be styled as first and

second judge, respectively. The chief justice may designate a judge in each circuit as the administrative judge for the circuit.

The district courts shall hold sessions at such places in their respective circuits and as often as the respective district judges deem essential to the promotion of justice.

* * *

§604-8 Criminal, misdemeanors, generally. District courts shall have jurisdiction of, and their criminal jurisdiction is limited to, criminal offenses punishable by fine, or by imprisonment not exceeding one year whether with or without fine. They shall not have jurisdiction over any offense for which the accused cannot be held to answer unless on a presentment or indictment of a grand jury.

In any case cognizable by a district court as aforesaid in which the accused has the right to a trial by jury in the first instance, the district court, upon demand by the accused, for such trial by jury, shall not exercise jurisdiction over such case, but shall examine and discharge or commit for trial the accused as provided by law, but if in any such case the accused does not demand a trial by jury on the date of arraignment or within ten days thereafter, the district court may exercise jurisdiction over the same subject to the right of appeal as provided by law.

§604-9 Same; powers. District courts shall have power, subject to appeal according to law and except as otherwise provided in cases in which the accused has the right to and demands a trial by jury in the first instance, to try without a jury, and to render judgment in all cases of criminal offenses coming within their respective jurisdictions.

APPENDIX U -

**HAWAII REVISED STATUTES
(1976 & Supp. 1979)**

**CHAPTER 707
OFFENSES AGAINST THE PERSON**

§707-712 Assault in the third degree. (1) person commits the offense of assault in the third degree if he:

- (a) Intentionally, knowingly, or recklessly causes bodily injury to another person; or
- (b) Negligently causes bodily injury to another person with a dangerous instrument.

(2) Assault in the third degree is a misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty misdemeanor.

**CHAPTER 711
OFFENSES AGAINST PUBLIC ORDER**

§711-1106 Harassment. (1) A person commits the offense of harassment if, with intent to harass, annoy, or alarm another person, he:

- (a) Strikes, shoves, kicks, or otherwise touches a person in an offensive manner or subjects him to offensive physical contact; or
- (b) Insults, taunts, or challenges another person in a manner likely to provoke a violent response; or
- (c) Makes a telephone call without purpose of legitimate communication; or
- (d) Makes repeated communications anonymously, or at extremely inconvenient hours, or in offensively coarse language.

(2) Harassment is a petty misdemeanor.

APPENDIX V
HAWAII REVISED STATUTES
(1976 & Supp. 1979)

CHAPTER 704
PENAL RESPONSIBILITY AND FITNESS TO PROCEED

§704-400 Physical or mental disease, disorder, or defect excluding penal responsibility. (1) A person is not responsible, under this Code, for conduct if at the time of the conduct as a result of physical or mental disease, disorder, or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

(2) As used in this chapter, the terms "physical or mental disease, disorder, or defect" do not include an abnormality manifested only by repeated penal or otherwise anti-social conduct.

§704-402 Physical or mental disease, disorder, or defect excluding responsibility is a defense; form of verdict and judgment when finding of irresponsibility is made. (1) Physical or mental disease, disorder, or defect excluding responsibility is a defense.

(2) Whenever the defense provided for by subsection (1) is submitted to a jury, the court shall, if requested by the defendant, instruct the jury as to the consequences to the defendant of an acquittal on the ground of physical or mental disease, disorder, or defect excluding responsibility.

(3) When the defendant is acquitted on the ground of physical or mental disease, disorder, or defect excluding responsibility, the verdict and the judgment shall so state.

§704-403 Physical or mental disease, disorder, or defect excluding fitness to proceed. No person who as a result of a physical or mental disease, disorder, or defect lacks capacity to understand the proceedings against him

or to assist in his own defense shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity endures.

§704-404 Examination of defendant with respect to physical or mental disease, disorder, or defect. (1) Whenever the defendant has filed a notice of intention to rely on the defense of physical or mental disease, disorder, or defect excluding responsibility, or there is reason to doubt his fitness to proceed, or reason to believe that the physical or mental disease, disorder, or defect of the defendant will or has become an issue in the case, the court may immediately suspend all further proceedings in the prosecution. If a trial jury has been empanelled, it shall be discharged or retained at the discretion of the court. The dismissal of the trial jury shall not be a bar to further prosecution.

(2) Upon suspension of further proceedings in the prosecution, the court shall appoint three qualified examiners to examine and report upon the physical and mental condition of the defendant. In each case the court shall appoint at least one psychiatrist and at least one certified clinical psychologist. The third member may be either a psychiatrist, certified clinical psychologist or qualified physician. One of the three shall be a psychiatrist or certified clinical psychologist designated by the director of health from within the department of health. The court may order the defendant to be committed to a hospital or other suitable facility for the purpose of the examination for a period not exceeding thirty days, or such longer period as the court determines to be necessary for the purpose, and may direct that one or more qualified physicians retained by the defendant be permitted to witness and participate in the examination.

(3) In such examination any method may be employed which is accepted by the medical profession for the examination of those alleged to be suffering from physical

or mental disease, disorder, or defect and the examiners may, upon approval of the court, secure the services of clinical psychologists and other medical or paramedical specialists to assist in the examination and diagnosis.

(4) The report of examination shall include the following:

(a) A description of the nature of the examination;

(b) A diagnosis of the physical or mental condition of the defendant;

(c) An opinion as to his capacity to understand the proceedings against him and to assist in his own defense;

(d) An opinion as to the extent, if any, to which the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired at the time of the conduct alleged; and

(e) When directed by the court, an opinion as to the capacity of the defendant to have a particular state of mind which is required to establish an element of the offense charged.

(5) If the examination cannot be conducted by reason of the unwillingness of the defendant to participate therein, the report shall so state and shall include, if possible, an opinion as to whether such unwillingness of the defendant was the result of physical or mental disease, disorder, or defect.

(6) The report of the examination, including any supporting documents, shall be filed in triplicate with the clerk of the court, who shall cause copies to be delivered to the prosecuting attorney and to counsel for the defendant.

(7) Any examiner shall be permitted to make a separate examination reasonably serving to clarify his diagnosis or opinion.

(8) There shall be made accessible to the examiners all existing medical, social, and other pertinent records in the

custody of public agencies notwithstanding any other statutes.

(9) The compensation of persons making or assisting in the examination, other than those retained by the nonindigent defendant, who are not undertaking the examination upon designation by the director of health as part of their normal duties as employees of the State or a county, shall be paid by the State.

§704-405 Determination of fitness to proceed. When the defendant's fitness to proceed is drawn in question, the issue shall be determined by the court. If neither the prosecuting attorney nor counsel for the defendant contests the finding of the report filed pursuant to section 704-404, the court may make the determination on the basis of such report. If the finding is contested, the court shall hold a hearing on the issue. When the report is received in evidence upon such hearing, the party who contests the finding thereof shall have the right to summon and to cross-examine the persons who joined in the report or assisted in the examination and to offer evidence upon the issue.

§704-406 Effect of finding of unfitness to proceed. (1) If the court determines that the defendant lacks fitness to proceed, the proceeding against him shall be suspended, except as provided in section 704-407, and the court shall commit him to the custody of the director of health to be placed in an appropriate institution for detention, care, and treatment for so long as such unfitness shall endure. If the court is satisfied that the defendant may be released on condition without danger to himself or to the person or property of others, the court shall order his release, which shall continue at the discretion of the court, on such conditions as the court determines necessary. A copy of the report filed pursuant to section 704-404 shall be attached to the order of committment or order of conditional release.

(2) When the court, on its own motion or upon the application of the director of health, the prosecuting attorney, or the defendant, determines, after a hearing if a hearing is requested, that the defendant has regained fitness to proceed, the penal proceeding shall be resumed. If, however, the court is of the view that so much time has elapsed since the commitment or conditional release of the defendant that it would be unjust to resume the proceeding, the court may dismiss the charge and may order the defendant to be discharged or, subject to the law governing the involuntary hospitalization or conditional release of persons suffering from physical or mental disease, disorder, or defect, order the defendant to be committed to the custody of the director of health to be placed in an appropriate institution for detention, care, and treatment or order the defendant to be released on such conditions as the court determines necessary.

§704-408 Determination of irresponsibility. If the report of the examiners filed pursuant to section 704-404 states that the defendant at the time of the conduct alleged suffered from a physical or mental disease, disorder, or defect which substantially impaired his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law, and the court, after a hearing if a hearing is requested, is satisfied that such impairment was sufficient to exclude responsibility, the court, on motion of the defendant, shall enter judgment of acquittal on the ground of physical or mental disease, disorder, or defect excluding responsibility.

§704-411 Legal effect of acquittal on the ground of physical or mental disease, disorder, or defect excluding responsibility; commitment; conditional release; discharge; procedure for separate post-acquittal hearing.
 (1) When a defendant is acquitted on the ground of physical or mental disease, disorder, or defect excluding responsibility, the court shall, on the basis of the report made pursuant to section 704-404, if uncontested, or the

medical evidence given at the trial or at a separate hearing, make an order as follows:

- (a) The court shall order him to be committed to the custody of the director of health to be placed in an appropriate institution for custody, care, and treatment if the court finds that the defendant presents a risk of danger to himself or the person or property of others and that he is not a proper subject for conditional release; or
 - (b) The court shall order the defendant to be released on such conditions as the court deems necessary if the court finds that the defendant is affected by physical or mental disease, disorder, or defect and that he presents a danger to himself or the person or property of others, but that he can be controlled adequately and given proper care, supervision, and treatment if he is released on condition; or
 - (c) The court shall order him discharged from custody if the court finds that the defendant is no longer affected by physical or mental disease, disorder, or defect, or, if so affected, that he no longer presents a danger to himself or the person or property of others and is not in need of care, supervision, or treatment.
- (2) The court shall, upon its own motion or on the motion of the prosecuting attorney or the defendant, order a separate post-acquittal hearing for the purpose of taking evidence on the issue of the risk of danger which the defendant presents to himself or to the person or property of others.
- (3) When ordering such a hearing the court shall appoint three qualified examiners to examine and report upon the physical and mental condition of the defendant. In each case the court shall appoint at least one psychiatrist and at least one certified clinical psychologist. The third member may be either a psychiatrist, certified clinical psy-

chologist or a qualified physician. One of the three shall be a psychiatrist or certified clinical psychologist designated by the director of health from within the department of health. To facilitate such examination and the proceedings thereon, the court may cause the defendant, if not then so confined, to be committed to a hospital or other suitable facility for the purpose of examination and may direct that qualified physicians retained by the defendant be permitted to witness and participate in the examination. The examination and report and the compensation of persons making or assisting in the examination shall be in accord with section 704-404(3), (4)(a) and (b), (6), (7), (8), and (9).

(4) Whether the court's order under subsection (1) is made on the basis of the medical evidence given at the trial or on the basis of the report made pursuant to section 704-404 or the medical evidence given at a separate hearing, the burden shall be upon the State to prove, by a preponderance of the evidence, that the defendant may not safely be discharged and that he should be either committed or conditionally released as provided in subsection (1).

APPENDIX W
HAWAII REVISED STATUTES
(1976 & Supp. 1979)
CHAPTER 560
UNIFORM PROBATE CODE
ARTICLE V
PROTECTION OF PERSONS UNDER DISABILITY AND
THEIR PROPERTY
PART 1. GENERAL PROVISIONS

§560:5-101 Definitions and use of terms. Unless otherwise apparent from the context, in this chapter:

- (1) "Guardianship proceeding" is a proceeding to appoint a guardian of the person for an incapacitated person or a minor;
- (2) "Incapacitated person" means any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person;
- (3) A "protective proceeding" is a proceeding under the provisions of section 560:5-401 to determine that a person cannot effectively manage or apply his estate to necessary ends, either because he lacks the ability or is otherwise inconvenienced, or because he is a minor, and to secure administration of his estate by a guardian of the property or other appropriate relief;
- (4) A "protected person" is a minor or other person for whom a guardian of the property has been appointed or other protective order has been made;
- (5) A "ward" is a person for whom a guardian of the person has been appointed. A "minor ward" is a minor

for whom a guardian of the person has been appointed solely because of minority.

§560:5-102 Jurisdiction of subject matter; consolidation of proceedings. The court has jurisdiction over protective proceedings and the family court has jurisdiction over guardianship proceedings. Where protective and guardianship proceedings relating to the same person have been initiated, they may be consolidated in the court or in the family court as the court and the family court in the exercise of their discretion shall determine.

* * *

§560:5-303 Procedure for court appointment of a guardian of the person of an incapacitated person. (a) The incapacitated person or any person interested in his welfare may petition the family court for a finding of incapacity and appointment of a guardian of the person.

(b) Upon the filing of a petition, the family court shall set a date for hearing on the issues of incapacity and, if at any time in the proceeding, the court determines that the interests of the allegedly incapacitated person are or may be inadequately represented, it shall appoint a guardian ad litem. The person alleged to be incapacitated may be examined by a physician appointed by the family court who shall submit his report in writing to the court and may be interviewed by a family court officer or other person designated by the family court. If so ordered by the family court, the family court officer or other person also shall interview the person seeking appointment as guardian of the person, shall visit the present place of abode of the person alleged to be incapacitated and the place it is proposed that he will be detained or reside if the requested appointment is made and shall submit his report in writing to the family court. The person alleged to be incapacitated is entitled to be present at the hearing in person, and to see or hear all evidence bearing upon

his condition. He is entitled to be represented by an attorney, to present evidence, to cross-examine witnesses, including any person submitting a report and the family court officer or other person designated by the court to interview him. The issue may be determined at a closed hearing.

§560:5-304 Finding; order of appointment. The family court may appoint any competent person, whose appointment would be in the best interest of the alleged incapacitated person, as a guardian of the person as requested if it is satisfied that the person for whom a guardian is sought is incapacitated and that the appointment is necessary or desirable as a means of providing continuing care and supervision of the person of the incapacitated person. The order of appointment may limit or otherwise modify the power of the guardian of the person or may specify areas in which the ward shall retain the power to make and carry out decisions concerning his person. Alternatively, the family court may dismiss the proceeding or enter any other appropriate order.

* * *

§560:5-309 Notices in guardianship proceedings. (a) In a proceeding for the appointment or removal of a guardian of the person of an incapacitated person other than the appointment of a temporary guardian or temporary suspension of a guardian, notice of the time and place of hearing shall be given by the petitioner to each of the following:

- (1) The ward or the person concerning whom the proceeding has been commenced and his spouse, legal parents, grandparents and adult children;
- (2) Any person who is serving as the guardian of his estate or who has his care and custody; and
- (3) In case no other person is notified under (1), at least one of his closest adult relatives, if any can be found.

(b) Notice shall be served personally on the alleged incapacitated person, his spouse, his legal parents, and his grandparents, if they can be found within the State. Notice to such of those who cannot be found within the State, and to all other persons except the alleged incapacitated person shall be given as provided in section 560:1-401. Waiver of notice by the person alleged to be incapacitated is not effective unless he attends the hearing or his waiver of notice is confirmed in an interview with the person sent by the family court to interview him. Except as provided in section 560:5-303 representation of the alleged incapacitated person by a guardian ad litem is not necessary.

* * *

§560:5-312 General powers and duties of guardian of the person. (a) A guardian of the person of an incapacitated person has the same powers, rights and duties respecting his ward that a parent has respecting his unemancipated minor child except that a guardian is not liable to third persons for acts of the ward solely by reason of the parental relationship. In particular, and without qualifying the foregoing, a guardian of the person has the following powers and duties, except as modified by order of the family court:

- (1) To the extent that it is consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment of the ward, he is entitled to custody of the person of his ward and may establish the ward's place of abode within or without this State.
- (2) If entitled to custody of his ward he shall make provision for the care, comfort and maintenance of his ward and, whenever appropriate, arrange for his training and education. Without regard to custodial right of the ward's person, he shall take reasonable care of his ward's clothing, furniture, vehicles and other per-

sonal effects and commence protective proceedings if other property of his ward is in need of protection.

(3) He may give any consents or approvals that may be necessary to enable the ward to receive medical or other professional care, counsel, treatment or service.

(4) If no guardian of the property of the ward has been appointed, he may:

- (i) Institute proceedings to compel any person under a duty to support the ward or to pay sums for the welfare of the ward to perform his duty;
- (ii) Receive money and tangible property deliverable to the ward and apply the money and property for support, care and education of the ward; but, he may not use funds from his ward's estate for room and board which he, his spouse, parent, or child have furnished the ward unless a charge for the service is approved by order of the family court made upon notice to at least one of the next of kin of the ward, if notice is possible. He must exercise care to conserve any excess for the ward's needs.

(5) He shall report the condition of his ward and of the estate which has been subject to his possession or control, as required by the family court or family court rule.

(6) If a guardian of the property has been appointed, all of the ward's estate received by the guardian of the person in excess of those funds expended to meet current expenses for support, care, and education of the ward must be paid to the guardian of the property for management as provided in this chapter, and the guardian of the person must account to the guardian of the property for funds expended.

APPENDIX X

**HAWAII REVISED STATUTES
(1976 & SUPP. 1979)**

**CHAPTER 334
MENTAL HEALTH, MENTAL ILLNESS,
DRUG ADDICTION, AND ALCOHOLISM**

§334-1 Definitions. As used in this chapter unless otherwise indicated by the context:

“Department” means the department of health.

“Director” means the director of health.

“Psychiatric facility” means a public or private hospital or part thereof which provides inpatient or outpatient care, custody, diagnosis, treatment or rehabilitation services for mentally ill person or for persons habituated to the excessive use of drugs or alcohol or for intoxicated persons.

“Community mental health center” means one or more facilities which alone or in conjunction with other facilities, public or private, are part of a coordinated program providing a variety of mental health services principally for persons residing in a community or communities in or near which the center is located.

“Administrator” means the person in charge of a public or private hospital.

“Licensed physician” means a physician or surgeon licensed by the State to practice medicine, including a physician and surgeon granted a limited and temporary license under section 453-3(1), (2), and (5) or a resident physician and surgeon granted a limited and temporary license under paragraph (4) thereof, or a medical officer of the United States while in this State in the performance of his official duties.

"Mentally ill person" means a person having psychiatric disorder or other disease which substantially impairs his mental health and necessitates treatment or supervision.

"Person suffering from substance abuse" means a person who uses narcotic, stimulant, depressant, or hallucinogenic drugs or alcohol to an extent which interferes with his personal, social, family, or economic life.

"Patient" means a person under observation, care, or treatment at a psychiatric facility.

"Admission procedures" means the various methods for admission of mentally ill persons or of persons habituated to the excessive use of drugs or alcohol to public and private psychiatric facilities.

"Authorized absence" means absence of a patient from a psychiatric facility for any period of time with permission.

"Unauthorized absence" means absence of a patient from a psychiatric facility for any period of time without permission.

"Discharge" means the formal termination on the records of a psychiatric facility of a patient's period of treatment at the facility.

"Intoxicated person" means a person who is deprived of reasonable self-control because of intake of alcohol or because of any substance which includes in its composition volatile organic solvents.

"Court" means any duly constituted court and includes proceedings, hearings of per diem judges as authorized by law.

"Dangerous to others" means likely to do substantial physical or emotional injury on another, as evidenced by a recent act, attempt or threat.

"Dangerous to self" means likely to do substantial physical injury to one's self, as evidenced by a recent act,

attempt or threat to injure one's self physically or by neglect or refusal to take necessary care for one's own physical health and safety together with incompetence to determine whether treatment for mental illness or substance abuse is appropriate.

"Dangerous to property" means inflicting, attempting or threatening imminently to inflict damage to any property in a manner which constitutes a crime, as evidenced by a recent act, attempt or threat.

"Guardian" means a guardian of person or of property as provided in Article V of chapter 560.

"Incapacitated person" is as provided in Article V of chapter 560.

"Interested person" means an interested, responsible adult, including but not limited to a public official, the legal guardian, spouse, parent, legal counsel, adult child, or next of kin of a person allegedly mentally ill, mentally deficient or suffering from substance abuse or as otherwise provided in Article I of chapter 560.

"Judge" means any judge of the family court or per diem judge appointed by the chief justice as provided in section 604-1.

"Mental health" means a state of social, psychological, and physical well-being with capacity to function effectively in a variety of social roles.

"Protected person" is as described in Article V of chapter 560.

"Special treatment facility" means a public or private facility which provides a therapeutic residential program for care, diagnosis, treatment or rehabilitation services for emotionally distressed persons, mentally ill persons or persons suffering from substance abuse.

"Treatment" means the broad range of emergency, outpatient, intermediate, domiciliary, and inpatient services

and care, including diagnostic evaluation, medical, psychiatric, psychological, and social service care, vocational rehabilitation, career counseling, and other special services which may be extended to handicapped persons.

* * *

[§334-59] Emergency examination and hospitalization.

(a) Initiation of proceedings. An emergency admission may be initiated as follows:

- (1) A police officer may take into custody and transport to any facility designated by the director any person who he has probable cause to believe is committing an offense due to apparent mental illness or substance abuse and appears to be imminently dangerous to property, to self or to others. A police officer may also take into custody and transport to any facility designated by the director any person threatening or attempting suicide. The officer shall make application for the examination, observation and diagnosis of the person in custody. The application shall state or shall be accompanied by a statement of the circumstances under which the person was taken into custody and the reasons therefor which shall be transmitted with the person to some physician at the facility.
- (2) Upon written or oral application of any licensed physician, attorney, member of the clergy, health or social service professional or any state or county employee in the course of his employment, a judge may issue an ex parte order orally, but shall reduce said order to writing by the close of the next court day following the application, stating that there is probable cause to believe a person is mentally ill or suffering from substance abuse and is imminently dangerous to self, to others, or to property and in need of care and/or treatment, giving the findings on which the conclusion is based and directing that a police officer or other suit-

able individual take the person into custody and deliver him to the nearest facility designated by the director for emergency examination and treatment. The ex parte order shall be made a part of the patient's clinical record. If the application is oral the person making the application shall reduce said application to writing and shall submit same by noon of the next court day to the judge who issued the oral ex parte order. The written application shall be executed subject to the penalties of perjury but need not be sworn to before a notary public.

- (3) Any licensed physician who has examined a person and has reason to believe the person is (A) mentally ill or suffering from substance abuse, and (B) is imminently dangerous to self, to others, or to property, and (C) is in need of care and/or treatment, may direct transportation, by ambulance or other suitable means, to a licensed psychiatric facility for further evaluation and possible emergency hospitalization and may administer such treatment as is medically necessary for the person's safe transportation.

(b) Emergency examination. A patient who is delivered for emergency examination and treatment to a facility designated by the director shall be examined by a licensed physician without unnecessary delay, and may be given such treatment as is indicated by good medical practice.

(c) Release from emergency examination. If the physician who performs the emergency examination concludes that the patient need not be hospitalized, the patient shall be discharged immediately unless the patient is under criminal charges, in which case he shall be returned to the custody of a law enforcement officer.

(d) Emergency hospitalization. If the physician who performs the emergency examination has reason to believe that the patient is (1) mentally ill or suffering from substance abuse, and (2) is imminently dangerous to self, to

others, or to property, and (3) is in need of care and/or treatment, the physician may hospitalize him on an emergency basis and/or cause the patient to be transferred to another psychiatric facility for emergency hospitalization. The patient shall have the right immediately upon admission to telephone his guardian or a member of his family or an adult friend and his attorney. If the patient declines to exercise his right, the staff of the facility shall inform an adult patient of his right to waive notification to his family and shall make reasonable efforts to ensure that the patient's guardian or family is notified of the emergency admission but the patient's family need not be notified if the patient is an adult and requests that there be no notification. The patient shall be allowed to confer with his attorney in private.

(e) Release from emergency hospitalization. If at any time during the period of emergency hospitalization the responsible physician concludes that the patient no longer meets the criteria for emergency hospitalization the physician shall discharge him. If the patient is under criminal charges, he shall be returned to the custody of a law enforcement officer. In any event, the patient must be released within forty-eight hours of his admission, unless the patient voluntarily agrees to further hospitalization, or a proceeding for court-ordered evaluation and/or hospitalization is initiated as provided in section 334-60(b)(2). If that time expires on a Saturday, Sunday or holiday, the time for initiation is extended to noon of the next court day. Upon initiation of the proceedings the facility shall be authorized to detain the patient until further order of the court.

[§334-60] Admission for nonemergency treatment or supervision.

* * *

(b) Involuntary hospitalization:

(1) Criteria. A person may be committed to a psychiatric facility for involuntary hospitalization if the court finds:

(A) That the person is mentally ill or suffering from substance abuse, and

(B) That he is dangerous to himself or others or to property, and

(C) That he is in need of care and/or treatment, and there is no suitable alternative available through existing facilities and programs which would be less restrictive than hospitalization.

(2) Initiation of proceeding. Court-ordered commitment to a psychiatric facility may be initiated as follows:

(A) Any person may file a petition alleging that a person located in the county meet the criteria for commitment to a psychiatric facility. The petition shall be executed subject to the penalties of perjury but need not be sworn to before a notary public. The attorney general, his deputy, special deputy, or appointee designated to present the case shall assist the petitioner to state the substance of the petition in plain and simple language. The petition may be accompanied by a certificate of a licensed physician who has examined the person with two days before submission of the petition, unless the person whose commitment is sought has refused to submit to medical examination, in which case the fact of refusal shall be alleged in the petition. The certificate shall set forth the signs and symptoms relied upon by the physician to determine the person is in need of care and/or treatment and whether or not he is capable of realizing and making a rational decision with respect to his need for treatment. If the petitioner believes that further evaluation is necessary before commitment, the petitioner may request such further evaluation.

(B) In the event the subject of the petition has been given an examination, evaluation or treatment in a psychiatric facility within five days before submission of the petition, and hospitalization is recommended by the staff of the facility, the petition may be accompanied by the administrator's certificate in lieu of a physician's certificate.

(3) Notice; waiver of notice; hearing on petition; waiver of hearing on petition.

(A) The court shall set a hearing on the petition and notice of the time and place of such hearing shall be served in accordance with, and to those persons specified in, a current order of commitment. If there is no current order of commitment, notice of the hearing shall be served personally on the subject of the petition and served personally or by certified or registered mail, return receipt requested, deliverable to the addressee only, on the subject's spouse, legal parents, adult children and legal guardian, if one has been appointed. If the subject of the petition has no living spouse, legal parent and adult children, or if none can be found, notice of the hearing shall be served on at least one of his closest adult relatives if any can be found. Notice of the hearing shall also be served on the public defender, attorney for the subject of the petition or other court-appointed attorney as the case may be. If the subject of the petition is a minor, notice of the hearing shall also be served upon the person who has had the principal care and custody of the minor during the sixty days preceding the date of the petition if such person can be found within the State. Notice shall also be given to such other persons as the court may designate.

(B) The notice shall include the following:

- (i) The date, time, place of hearing, a clear statement of the purpose of the proceedings and of possible consequences to the subject; and a statement of the legal standard upon which commitment is authorized;
 - (ii) A copy of the petition;
 - (iii) A written notice, in plain and simple language, that the subject may waive such a hearing by voluntarily agreeing to hospitalization, or with the approval of the court, to some other form of treatment;
 - (iv) A filled-out form indicating such waiver;
 - (v) A written notice, in plain and simple language, that the subject or his guardian or representative may apply at any time for a hearing on the issue of the subject's need for hospitalization, if he has previously waived such a hearing;
 - (vi) Notice that the subject is entitled to the assistance of an attorney and that the public defender has been notified of these proceedings;
 - (vii) Notice that if the subject does not want to be represented by the public defender he may contact his own attorney.
- (C) If the subject executes and files a waiver of the hearing, upon acceptance by the court following a court determination that the person understands his rights and is competent to waive them, the court shall order the subject to be committed to a facility that has agreed to admit the subject as an involuntary patient or, if he is at such a facility, that he be retained there.
- (4) Hearing on petition.

- (A) The court may adjourn or continue a hearing for failure to timely notify a spouse, guardian, relative or other person determined by the court to be entitled to notice.
- (B) The time and form of the procedure incident to hearing the issues in the petition shall be provided by court rule. Unless the hearing is waived, the judge shall hear the petition as soon as possible and no later than ten days after the date the petition is filed unless a reasonable delay is sought for good cause shown by the subject of the petition, his attorney, or those persons entitled to receive notice of the hearing under subsection (b)(3).
- (C) The subject of the petition shall be present at all hearings unless he waives his right to be present, is unable to attend or creates conditions which make it impossible to conduct the hearing in a reasonable manner as determined by the judge. A waiver is valid only upon acceptance by the court following a judicial determination that the person understands his rights and is competent to waive them or is unable to participate. If the subject is unable to participate, the judge shall appoint a temporary guardian as provided in Article V of chapter 560, to represent him throughout the proceedings.
- (D) Hearings may be held at any convenient place within the circuit. The subject of the petition, any interested person, or the court on its own motion may request a hearing in another circuit because of convenience to the parties, witnesses, or the court or because of the individual's mental or physical condition.
- (E) The attorney general, his deputy, special deputy, or appointee shall present the case for hearings convened under this chapter, except that the attorney general, his deputy, special deputy, or ap-

pointee need not participate in or be present at a hearing whenever a petitioner or some other appropriate person has retained private counsel who will be present in court and will present to the court the case for involuntary hospitalization.

(F) Counsel for the subject of the petition shall be allowed adequate time for investigation of the matters at issue and for preparation, and shall be permitted to present the evidence that the counsel believes necessary to a proper disposition of the proceedings, including evidence as to alternatives to inpatient hospitalization.

(G) No individual may be found to require medical treatment unless at least one physician who has personally examined him testifies in person at the hearing. This testimony may be waived by the subject of the petition. If the subject of the petition has refused to be examined by a licensed physician, he may be examined by a court-appointed licensed physician. If he refuses and there is sufficient evidence to believe that the allegations of the petition are true, the court may make a temporary order committing him to a psychiatric facility for a period of not more than five days for the purpose of a diagnostic examination and evaluation. The subject's refusal shall be treated as a denial that he is mentally ill or suffering from substance abuse. Nothing herein, however, shall limit the individual's privilege against self-incrimination.

(H) The subject of the petition in a hearing under this section has the right to secure an independent medical evaluation and present evidence thereon.

(I) If after hearing all relevant evidence, including the result of any diagnostic examination ordered by the court, the court finds that an individual is not a person requiring medical, psychiatric, or other re-

habilitative treatment or supervision, the court shall order that he be discharged if he has been hospitalized prior to the hearing. If the court finds beyond a reasonable doubt that the criteria for involuntary hospitalization has been met, the court may issue an order to any police officer to deliver the subject to a facility that has agreed to admit the subject as an involuntary patient, or if the subject is already a patient in a psychiatric facility, authorize the facility to retain the patient for treatment for a period of ninety days unless sooner discharged. An order of commitment shall specify which of those persons served with notice pursuant to subsection (b)(3), together with such other persons as the court may designate, shall be entitled to receive any subsequent notice of intent to discharge, transfer, or recommit.

(J) The court may find that the subject of the petition is an incapacitated and/or protected person under Article V of chapter 560, and may appoint a guardian of the person and/or property for the subject under the terms and conditions as the court shall determine.

(5) Period of detention. The psychiatric facility may detain a subject for a period of time ordered by the court not to exceed ninety days from date of admission unless sooner discharged by the facility pursuant to section 334-76 or section 334-74. At the end of the ninety-day period he shall be discharged automatically except as provided in sections 704-406, 704-411, and 706-607, unless before expiration of the period and by a proceeding initiated pursuant to this section the facility obtains a court order for his recommitment. Recommitment for a period not to exceed ninety days may not be ordered unless the court determines that the criteria for involuntary hospitalization set forth in subsection (b)(1) continue to exist. If at the end of a re-

commitment period the court finds that the criteria for involuntary hospitalization set forth in subsection (b)(1) continue to exist and are likely to continue beyond ninety days, the court may order recommitment for a period not to exceed 180 days.

- (6) Notice of intent to discharge. When the administrator of a psychiatric facility contemplates discharge of an involuntary patient because of expiration of the court order for commitment or because the patient is no longer a proper subject for commitment, as determined by the criteria for involuntary hospitalization is subsection (b)(1), he shall provide notice of intent to discharge. The notice shall be filed with the court and served personally or by certified mail on those persons which the order of commitment specifies an entitled to receive notice. If no objection is filed within three days of service, the court shall enter an order of discharge. If any person specified as entitled to receive notice files a written objection to discharge, the court shall conduct a hearing prior to issuing an order of discharge.

[§334-61] Presumption; civil rights. No presumption of insanity or legal incompetency shall exist with respect to any patient by reason of his admission to a psychiatric facility under this chapter. The fact of the admission shall not in itself modify or vary any civil right of any such person, including but not limited to civil service statutes or rights relating to the granting, forfeiture, or denial of a license, permit, privilege, or benefit pursuant to any law, or the right to dispose of property, execute instruments, make purchases, enter into contractual relationships and to vote. If the administrator of a psychiatric facility or his deputy is of the opinion that a patient should not exercise any civil right, application for a show cause order shall be made to the court under the above proceedings after notice pursuant to section 334-60(b)(3).

[§334-62] Service of process and papers upon patients.

(a) Service of process and papers upon a patient in a psychiatric facility or a patient on authorized or unauthorized absence from a psychiatric facility shall be made in the following manner:

(1) Service of process and papers relating to the involuntary hospitalization of the patient shall be made directly and personally upon the patient and shall also be made personally or by certified mail upon his guardians and the public defender, his attorney or court-appointed attorney; otherwise, service upon the patient shall be incomplete. A copy of the legal process or paper served on a patient under this paragraph shall be given to the administrator of the psychiatric facility or his deputy and shall be filed with the records of the patient.

(2) Service of process and papers not relating to the involuntary hospitalization of the patient shall be made directly and personally upon the patient, his guardians, and the administrator of the psychiatric facility or his deputy; otherwise, service upon the patient shall be incomplete and shall not give the issuing court or agency jurisdiction over the person of the patient. A legal process or paper served under this paragraph shall be filed with the records of the patient, and the administrator of the psychiatric facility or his deputy shall immediately inform the court or other agency out of which the process or paper issued, in writing, of the date of service and of the mental and physical condition of the patient.

(b) Neither the administrator nor anyone connected with a psychiatric facility shall accept service of process or papers on behalf of a patient.

APPENDIX Y
HAWAII RULES
OF
APPELLATE PROCEDURE
(1986 ed.)
* * *

**Rule 31. ASSIGNMENT OF CASES AND MATTERS
ADDRESSED TO THE JURISDICTION OF THE
SUPREME COURT AND THE INTERMEDIATE
COURT OF APPEALS; REASSIGNMENT PROCE-
DURES; CERTIORARI.**

(a) Initial Assignment of Cases, The chief justice, or his designee to be appointed by the chief justice from among the regularly appointed justices of the Supreme Court or from among the regularly appointed judges of the Intermediate Court of Appeals, shall receive each case or matter. The clerk of the Supreme Court shall forward the complete file of the case or matter to the assignment judge or justice no later than the close of business on the fifth working day following the filing deadline for the last document permissible to be filed in the case pursuant to court rule.

The assignment judge or justice shall file an order with the clerk of the Supreme Court assigning the case or matter either to the Intermediate Court of Appeals or to the Supreme Court no later than the 20th working day following the filing deadline of the last document permissible to be filed in the case or matter pursuant to court rules provided, however, that if the opening or answering brief of one or more of the parties to the appeal has noted the existence of a related case on appeal pursuant to HRAP Rule 28(b)(11) or 28(c) and briefing of such case has not been completed, the assignment judge or justice may, in his or her discretion, delay assignment of the appeal until the day upon which he or she assigns the related case.

The clerk of the Supreme Court shall cause the order of assignment to be served upon all parties.

The assignment judge may consider the relative workloads of the Supreme Court and of the Intermediate Court and, among other relevant matters, the following questions and their substantiality in determining whether the case or matter involves a question of such importance that it should be assigned to the Supreme Court:

(1) Whether the case involves a question of first impression or presents a novel legal question.

(2) Whether the case involves a question of state or federal constitutional interpretation.

(3) Whether the case raises a question of law regarding the validity of a state statute, county ordinance, or agency regulation.

(4) Whether the case involves issues upon which there is an inconsistency in the decisions of the Intermediate Court of Appeals or of the Supreme Court.

(5) Whether the sentence in a criminal case is life imprisonment without possibility of parole.

* * *

(e) Application for Writ of Certiorari in the Supreme Court.

(a) *Application; When Filed*, No later than 10 days after the filing of a decision or ruling of the Intermediate Court of Appeals or after the filing of an order denying a timely motion for reconsideration by the Intermediate Court of Appeals, any party may apply in writing to the Supreme Court for a writ of certiorari to review such decision or ruling.

(2) *Discretion of the Court*. Review by the Supreme Court of a decision of the Intermediate Court of Appeals is a matter within the discretion of the Supreme Court.

(3) *Denomination of Parties.* The party appealing from the decision of the Intermediate Court of Appeals shall be denominated the petitioner; the petitioner's denomination in the opinion of the Intermediate Court of Appeals shall also be included so that a petitioner shall be denominated petitioner-appellant or petitioner-plaintiff, or petitioner-appellee or petitioner-defendant. All other parties in this court shall be denominated respondents and each respondent's denomination in the opinion of the Intermediate Court of Appeals shall also be included so that each respondent shall be denominated respondent-appellant or respondent-plaintiff, or respondent-appellee or respondent-defendant. Any respondent who supports the position of a petitioner shall meet the time schedule for filing papers which is provided for that petitioner.

(4) *Contents.* The application for a writ of certiorari shall contain in the following order:

(A) A short and concise statement of the question or questions presented for decision, set forth in the most general terms possible. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Questions not presented according to this paragraph will be disregarded. The court, at its option, may notice a plain error not presented.

(B) A statement of prior proceedings in the case.

(C) A short statement of the case containing the facts material to the consideration of the questions presented.

(D) A brief argument, not to exceed 10 typewritten pages, with supporting authorities.

(E) A copy of the decision of the Intermediate Court of Appeals.

(5) *Opposition; Form.* Within 5 days after filing of an application for a writ of certiorari, any other party to the case may, but need not, file and serve a brief written

answer containing a statement of reasons why the application should not be granted.

(6) *Oral Argument.* There shall be no oral argument on an application for a writ of certiorari unless requested by the Supreme Court.

(7) *Determination.* The Supreme Court shall act upon an application for a writ of certiorari no later than 10 days after the filing of the application. The failure of the court to issue such writ within 10 days shall constitute a rejection of the application. The Supreme Court by order may extend the 10-day limitation in this rule.

(8) *No Reconsideration of Acceptance or Rejection of Application for a Writ of Certiorari.* Neither acceptance nor rejection of an application for a writ of certiorari shall be subject to reconsideration in the Supreme Court.

(9) *Review by Supreme Court After Acceptance of Application for a Writ of Certiorari.* If the Supreme Court accepts the application for a writ of certiorari to review a decision of the Intermediate Court of Appeals, the case shall be decided on the record and briefs previously filed. The Supreme Court may limit the question on review, may request additional briefs and may set the case for oral argument. Within 10 days of the acceptance of the application for a writ of certiorari, a party may move in the Supreme Court for permission to file a supplemental brief. The court may impose restrictions as to the length and filing of such brief and any response thereto.

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Rule 40. MOTION FOR RECONSIDERATION.

(a) **Time.** A motion for reconsideration may be filed by a party only within 10 days after the filing of the opinion or ruling unless by special leave additional time is granted during such period by a judge or justice of the appellate court involved.

(b) Contents. The motion shall state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. The motion shall also be supported by a certificate of counsel to the effect that it is presented in good faith and not for purposes of delay.

(c) Answer; Reply; Argument. No answer to a motion for reconsideration or reply to an answer will be received unless requested by the court. There shall be no oral argument on a motion for reconsideration unless ordered by the court on its own motion.

(d) Disposition of Motion. The court within 10 days of the filing of a motion for reconsideration, shall either grant or deny such motion. The failure of the court to act within the 10 days shall constitute a rejection. If a motion for reconsideration is granted, the court may modify the decision without new argument, order new argument, or take such other action as may be appropriate.

(e) Only One Motion Permitted. Only one motion for reconsideration may be filed by any party, even if the court modifies its decision or changes the language in the opinion rendered by the court.

**Rule 41. STAY OF JUDGMENT; PREPARATION AND
ISSUANCE OF JUDGMENT AND NOTICE OF
ENTRY OF JUDGMENT.**

(a) Stay of Judgment and Notice of Entry of Judgment. The timely filing of a motion for reconsideration shall stay the finality of the decision until the disposition of the motion unless otherwise ordered by the court. The timely filing of an application for a writ of certiorari shall stay the finality of the decision unless otherwise ordered by the Supreme Court. If the application for a writ is rejected, the decision shall be final as of the date of rejection.

(b) Prevailing Party's Obligation. In all cases the prevailing party or, in the case of a dispute as to who is the prevailing party, the party designated by the clerk of the Supreme Court shall prepare and submit to the clerk of the Supreme Court within 10 days after a final decision has been filed in the case a proposed final judgment and notice of final judgment. Upon presentation to the clerk, the clerk shall forthwith present the same to a judge or justice for approval, and upon approval, the same shall forthwith be entered and filed. Failure of attorneys and parties to comply with this rule shall be grounds for the imposition of such sanctions as the court deems appropriate.

APPENDIX Z**HAWAII RULES
OF
CIVIL PROCEDURE
(1986 ed.)****Rule 35. PHYSICAL AND MENTAL EXAMINATION
OF PERSONS.**

(a) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) Report of Examining Physician.

(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination, shall be entitled upon request to receive from the party against whom the order is made a like report of any examination previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are

just, and if a physician fails or refuses to make a report the court may exclude his testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician in accordance with the provisions of any other rule.

(Amended May 15, 1972, effective July 1, 1972.)

